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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 684

MICHIGAN WISCONSIN PIPE LINE COMPANY,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Michigan Wisconsin Pipe Line Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on November 16, 1955.

OPINIONS BELOW.

The orders of the Federal Power Commission (R. 83, 106)[1] are not officially reported. The opinion of the Court of Appeals (SR. 4) is reported at 227 F. 2d 470 and is reproduced as Appendix A, *infra,* pp. 1a-12a.

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[1] The record in this court consists of a bound volume prepared for use in the Court of Appeals and a supplemental transcript of proceedings in that court. The former will be cited "(R. ....)" and the latter will be cited "(SR. ....)." Emphasis is supplied throughout.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 16, 1955 (SR. 19). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

In proceedings under the Natural Gas Act to determine the just and reasonable rates of a natural gas pipeline company, the Federal Power Commission determined the rate that company could lawfully pay its supplier, another natural gas company, for gas purchased from the latter. The questions presented are:

1. Whether the rate thus fixed is subject to subsequent collateral attack by the supplier on the ground that it was not a party to the proceedings, although on notice that its lawful rate to the pipeline company would be determined therein.

2. Whether a reviewing court, upon appeal from a determination by the Commission of an "effective" rate under its regulations, may set aside that determination and fix a different rate by applying principles of general contract law.

STATUTE INVOLVED.

Pertinent provisions of the Natural Gas Act, 15 U. S. C. § 717 *et seq.*, are printed in Appendix B, *infra*, pp. 13a-15a.

STATEMENT.

This petition seeks review of a decision of the United States Court of Appeals for the Tenth Circuit setting aside two orders issued by the Federal Power Commission under the Natural Gas Act. These orders involved a determination by the Commission of the proper initial rate to

be charged for natural gas sold by Phillips Petroleum Company to petitioner, a natural gas pipeline company, and the court's decision in effect establishes a higher rate than that approved by the Commission. Since petitioner's rates for resale of the gas had in turn been fixed by the Commission on the basis of the price it had determined that Phillips might lawfully charge, and petitioner had made refunds to its customers on that basis, the court's action has the effect of requiring petitioner to pay Phillips large sums of money for which no allowance had been made in petitioner's rates. The facts of this controversy are as follows:

1. The Gas Purchase Contract.

Petitioner, a natural gas company, owns and operates a natural gas pipeline extending from the Guymon-Hugoton gas field of Texas and Oklahoma to points of connection with local gas distribution companies serving Detroit and Milwaukee and other communities in Michigan and Wisconsin. Petitioner purchases gas at the mouth of its pipeline from Phillips, an independent producer of gas, under a long-term contract dated December 11, 1945. That contract provided, among other things, for a specified base price to be paid by petitioner during the first five years after commencement of deliveries of gas, with specified increases every five years thereafter during the life of the contract. In addition, the contract contained an "escalator" clause providing for further increases in the contract price based upon increases in the Bureau of Labor Statistics' wholesale price index and increases in petitioner's resale rates authorized by the Federal Power Commission.

The basic contract was subsequently amended on December 1, 1949 to provide with respect to price: (1) that the "base price" of gas during the first five years of deliveries would be 6.6997 cents per Mcf, with periodic

increases thereafter (R. 129); (2) that notwithstanding this "base price," the minimum price to be paid during the first five years would be 7.5930 cents per Mcf (R. 132); and (3) that, subject to this minimum price provision, the base price of 6.6997 cents would be escalated in the same ratio as petitioner's effective resale rates exceeded 25 cents per Mcf.[2] In short, the escalator clause provided that Phillips' price would be increased above the base price of 6.6997 cents per Mcf in the same ratio as petitioner's resale rates exceeded 25 cents per Mcf, subject, however, to a fixed minimum of 7.5930 cents per Mcf.

Shortly after petitioner commenced operations in 1949, the Commission ordered petitioner to file a rate of 28 cents per Mcf. While this rate was being charged, the escalator clause of the Phillips contract had no effect, since the escalated price was less than the minimum of 7.5930 cents per Mcf fixed by the contract (28/25 of 6.6997 cents = 7.5036 cents).

2. The Michigan Wisconsin Rate Case and the Supplemental Agreements.

In March of 1951, however, petitioner applied for an increase in its rates from 28 cents to 31.5 cents per Mcf, which increase was suspended by the Commission and set for hearing as Docket No. G-1678. On October 1, 1951, the suspension period having expired, petitioner exercised its right under Section 4(e) of the Act to begin charging the increased rate under bond, conditioned to refund to its customers any portion of the increase ultimately disallowed by the Commission.

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[2] These prices were computed on a pressure base of 14.65 psia prescribed as standard by Texas law. Since petitioner's operating pressure was actually 14.735 psia, it was necessary to multiply these figures by the factor 1.0058 to determine petitioner's actual cost of gas purchased. The prices stated in this brief will refer to the pressure base of 14.65 psia.

Since the rate which the Commission would ultimately approve—upon which the escalator clause of the contract depended—could not then be ascertained, Michigan Wisconsin and Phillips entered into a letter agreement dated October 31, 1951, under which Michigan Wisconsin agreed currently to pay Phillips an escalated price based upon the full 31.5-cent rate then being charged under bond. Phillips in turn agreed, upon final decision of the rate case, to refund to Michigan Wisconsin the difference between the amount thus paid by Michigan Wisconsin and the amount Phillips would have received under the escalation formula as applied to the resale rate ultimately approved by the Commission (R. 63-64). Under this agreement, the price paid by Michigan Wisconsin to Phillips during the period October 1, 1951 to December 12, 1952 was 31.5/25 of 6.6997 cents or 8.4416 cents per Mcf.

In June of 1952, while proceedings in Docket No. G-1768 were still pending before the Commission, Michigan Wisconsin filed an application for further rate increase from 31.5 cents to 35 cents per Mcf. This increase was also suspended and the proceedings were consolidated with Docket No. G-1678 for hearing. Upon the expiration of this suspension period, December 12, 1952, Michigan Wisconsin began charging the 35-cent rate under bond and subject to refund as in the case of the 31.5-cent rate. Michigan Wisconsin and Phillips then entered into a second letter agreement, dated January 15, 1953, under which Michigan Wisconsin agreed currently to pay Phillips an escalated price based upon the full 35-cent rate, and Phillips agreed, upon final decision of the rate case, to refund to Michigan Wisconsin the difference between this amount and the amount Phillips would have received under the escalation formula as applied to the resale rate ultimately approved by the Commission (R. 64-65). The

price paid by Michigan Wisconsin under this agreement was 35/25 of 6.6997 cents or 9.3796 cents per Mcf.

3. The Phillips Decision and Order No. 174.

On June 7, 1954, while petitioner's rate case was before the Commission awaiting decision, this Court handed down its decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, holding Phillips to be a natural gas company and its sales to petitioner to be within the regulatory authority of the Federal Power Commission. In response to this decision the Commission, on July 16, 1954, issued its Order No. 174 (19 F. R. 4534-37) prescribing comprehensive additions to its general regulations governing rate filings by so-called independent producers such as Phillips.[3]

While the *Phillips* case had held, in effect, that independent producers had been subject to the Natural Gas Act since its enactment in 1938, the Commission recognized the practical necessity of fixing some more recent date as of which to apply the rate filing and rate increase requirements of the Natural Gas Act. The date chosen was June 7, 1954, the date of the *Phillips* decision. Accordingly, Section 154-92 of the Commission's new regulations provided in part:

> "(a) Every independent producer who, on or since June 7, 1954, has engaged in the interstate transportation and sale of natural gas subject to the jurisdiction of the Commission shall on or before October 1, 1954, file with the Commission rate schedules, as defined in Section 154.93 hereof, setting forth the terms and conditions of service and all rates and charges for such transportation or sale effective on June 7, 1954. • • •"

[3] Order No. 174 was superseded on August 6, 1954 by Order No. 174-A (19 F.R. 5081-83), and Phillips' rate filings were made pursuant to the latter order. However, to the extent here material, the regulations were substantially identical.

In Section 154.93 the term "rate schedule" was defined as

> "* * * the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, * * *."

And Section 154.94 provided with respect to changes in rate schedules:

> "No change shall be made in any rate, charge, or service in effect on and after June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce * * * without first filing a change in rates pursuant to Section 4(d) of the Natural Gas Act and in accordance with this section."

4. Opinion No. 275 (The Michigan Wisconsin Rate Case Opinion).

The regulations adopted by the Commission provided that an independent producer's initial rates to be filed with the Commission were those "effective on June 7, 1954." Even before Phillips filed its contracts on August 31, 1954, however, the question arose as to what rate applicable to its sales to petitioner was "effective" on June 7, 1954. The occasion for consideration of this question was the Commission's decision in petitioner's rate case, which was issued July 30, 1954, as Opinion No. 275.[4]

In support of its application for a rate of 31.5 cents from October 1, 1951 to December 12, 1952 and a rate of 35 cents thereafter, petitioner had of course claimed as its cost of gas purchased from Phillips the price prescribed by the escalation clause of the contract, as amended, based upon those respective resale rates. In Opinion No. 275, however, the Commission held that, in view of this Court's decision in the *Phillips* case, there had now been "injected into these proceedings" the question of Phillips' lawful

[4] Pertinent portions of the Commission's opinion are attached hereto as Appendix C, *infra*, pp. 16a-22a.

charges to petitioner, since petitioner would not be entitled to claim as its cost of gas purchased any higher rate than Phillips might lawfully charge. The Commission then concluded that the rates of 31.5 cents and 35 cents that petitioner had been charging under bond "are only tentative" and are not "effective rates," and that "[t]he only effective rate which Michigan Wisconsin has ever established for the sale of gas for resale is 28 cents per Mcf and we have allowed rates to Phillips based on that price."[5]

By its action in petitioner's rate case, the Commission thus rejected the contention that Phillips was entitled to prices escalated on the basis of the 31.5-cent and 35-cent rates charged by petitioner under bond and concluded, instead, that Phillips' only lawful charges were those based upon petitioner's 28-cent resale rate in effect prior to initiation of the proceedings in 1951. Petitioner's cost of gas purchased was accordingly determined to be 7.5036 cents per Mcf, representing 28/25 of the base price of 6.6997 cents.[6]

Petitioner thereafter filed an application for modification or rehearing of Opinion No. 275 and its accompanying order, pointing out among other things that Phillips was insisting upon payment of a price based upon the full amount of the resale rates fixed by the Commission[7] and had advised petitioner that Phillips would not make any refund on the basis of the Commission's disallowance of any escalation under the contract. The Commission thereupon agreed to reconsider Opinion No. 275 (R. 85).

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[5] *Infra*, pp. 20a-21a.

[6] The Commission overlooked the fact that this amount is lower than the minimum rate of 7.5930 cents fixed by the contract, as amended, but rectified that error on rehearing.

[7] In Opinion No. 275, the Commission fixed petitioner's rates at 31.19 cents per Mcf for the period October 1, 1951-December 12, 1952 and 30.85 cents thereafter.

5. The Commission's Order of October 1, 1954.

On August 31, 1954, pursuant to Order No. 174-A, Phillips submitted for filing with the Commission its basic contract with petitioner dated December 11, 1945 (Rate Schedule No. 4), together with eleven amendatory agreements thereto, including the letter agreements of October 31, 1951 and January 15, 1953 (Supplements 8 and 11 respectively). In its rate filing Phillips took the position that its "effective rate" as of June 7, 1954 was 9.3796 cents per Mcf, which was derived by applying the escalator clause of the contract, as amended, to the resale rate of 35 cents per Mcf petitioner was charging on that date under bond and subject to refund.

In its order of October 1, 1954 (R. 84-86), the first order reviewed by the court below, the Commission applied its holding in petitioner's rate case (Opinion No. 275) that Phillips' "effective rate" as of June 7, 1954 was its base price under the contract, as amended, escalated only on the basis of an effective resale rate for Michigan Wisconsin, of 28 cents per Mcf. The Commission therefore treated the two letter agreements under which petitioner had agreed to pay Phillips on the basis of its proposed rates of 31.5 cents and 35 cents subject to refund by Phillips (Supplements 8 and 11) as applications for rate increases rather than a part of Phillips' initial rate filing. Supplements 8 and 11 were accordingly suspended.

In its order, the Commission specifically pointed out that the issues raised by the escalator clause of the contract were already pending before the Commission upon reconsideration of its decision in petitioner's rate case (Opinion No. 275), stating:

> "On September 27, 1954, upon consideration of the application of Michigan Wisconsin Pipe Line Company for modification of Opinion No. 275 and accompany-

ing order, the Commission granted such application to the extent only that it requested a reconsideration of that opinion and order upon the present record. *In the determination of the issues thus raised, consideration must be given to the proper rates for gas purchased by Michigan Wisconsin from Phillips,* and it is proper and in the public interest that pending such reconsideration the rate increases filed by Phillips applicable to gas purchased by Michigan Wisconsin be suspended." (R. 85.)[8]

6. Opinion No. 275-A.

Thereafter, on November 29, 1954, the Commission issued its Opinion No. 275-A granting in part and denying in part petitioner's application for modification or rehearing of Opinion No. 275.[9] With respect to the price of Phillips' sales to petitioner, the Commission first noted its error in failing to give effect to the minimum price provision of the contract.[10] It then held, however, as in Opinion No. 275, that the price to be allowed Phillips for sales made during the period October 1, 1951 to December 12, 1952, when petitioner was charging 31.5 cents under bond, should not be based on that rate but upon the 28 cent rate theretofore charged by petitioner. Petitioner's cost of gas purchased for this period was accordingly determined to be the minimum of 7.5930 cents per Mcf fixed by the contract, as amended.[11]

With respect to the price to be allowed Phillips for the period on and after December 12, 1952, the Commission

[8] Phillips filed an application for rehearing of the order issued October 1, 1954 (R. 87-105).

[9] Opinion No. 275-A is set out in full as Appendix D, *infra*, pp. 23a-30a.

[10] See Footnote 6.

[11] Petitioner's resale rate for the period October 1, 1951 to December 12, 1952 was fixed at 31.25 cents per Mcf based upon this determination of Phillips' lawful charge.

took a somewhat different view. It noted that, by providing for the filing of rates of independent producers in effect on June 7, 1954, the Commission had necessarily recognized past increases resulting from escalator clauses in other gas purchase contracts and stated that a failure to recognize some increase in price would "be somewhat unfair to Phillips when compared with the treatment which we accorded other independent producers which are also natural gas companies." (p. 28a, *infra.*)

The Commission therefore concluded that Phillips should be allowed as its "effective rate", and petitioner should be allowed as its cost of gas purchased on and after December 12, 1952, the price of 8.374 cents per Mcf, which represented the application of the escalator clause of the contract to a resale rate of 31.25 cents per Mcf.[12] After reaching this conclusion, the Commission stated:

> "This will require some modification of the Commission's order issued October 1, 1954, suspending certain of Phillips' rates. Such action will be entered in the appropriate docket (No. G-3176)." (p. 28a, *infra.*)

7. The Commission's Order of December 8, 1954.

In accordance with this statement, the Commission on December 8, 1954 issued the second order reviewed by the court below (R. 106-110) in Docket No. G-3176, the proceedings involving Phillips' initial rate filing. In its order, the Commission simply referred to and applied its decision on rehearing in petitioner's rate case (Opinion No. 275-A) that Phillips' effective rate as of June 7, 1954 was 8.374 cents per Mcf, the price computed under the escalation formula as applied to petitioner's resale rate of 31.25 cents per Mcf.

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[12] This was the resale rate the Commission had allowed petitioner for the previous period. See footnote 11, *supra.* On the basis of the rate of 8.374 cents allowed Phillips on and after December 12, 1952, petitioner's rates for that period were fixed at 31.60 cents per Mcf.

8. The Decision of the Court of Appeals.

Phillips thereupon filed a petition to review the Commission's orders of October 1 and December 8, 1954 under Section 19(b) of the Natural Gas Act. In opposing Phillips' prayer that those orders be set aside, petitioner contended that Phillips, having been on notice that its proper initial rate for sales of gas to petitioner was in issue in petitioner's rate case, was bound by the Commissioner's determination therein and could not subsequently attack that determination collaterally. The court below rejected this contention with the statement:

> "Phillips was not a party to the proceedings which purported to fix its rates, and we can find no warrant in the Natural Gas Act for the determination of its rates and charges in proceedings to which it was not a party." (*infra*, p. 12a.)[13]

Petitioner also contended that the Commission's determination of Phillips' rates was consistent with the Natural Gas Act and the regulations of the Commission issued thereunder. But the court below held that the Commission's orders of October 1 and December 8, 1954 presented "purely questions of law involving the construction of a contract" (*infra*, p. 12a) and concluded that, properly construed, the contract required that Phillips be allowed as its effective rate on June 7, 1954, the price of 8.4684 cents per Mcf (based upon petitioner's resale rate of 31.60 cents per Mcf ultimately fixed by the Commission) rather than the rate of 8.374 cents set by the Commission (*infra*, p. 12a).

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[13] The court, in summarizing its conclusions, also stated: "• • • the orders pursuant to Opinions Nos. 275 and 275A have no binding effect upon the issues involved here" (*infra*, p. 12a).

REASONS FOR GRANTING THE WRIT.

The court below has decided two important questions of administrative law without discussion of the underlying principles involved and in a manner that conflicts with decisions of other courts of appeals and this Court. The decision is one that, if not reviewed by this Court, will have large and continuing significance in two respects: (1) it sanctions collateral attacks upon administrative orders by persons who, knowing that their rights are involved in administrative proceedings, nevertheless elect to remain aloof until the rights of others have been irrevocably fixed in such proceedings; and (2) it assumes authority to set aside an administrative order determining the rates of a regulated company under valid agency regulations by applying principles of general contract law.

1. While some of the contract provisions and certain of the procedural details here involved are somewhat complex, the facts necessary to a statement of the basic issues —and the issues themselves—are simple and straightforward. First, petitioner applied for an increase in its rates for resale of gas to distributing companies. One of the very important elements in its cost of service is, of course, the price of the gas it purchases from its supplier, Phillips Petroleum Company. Since this Court held that *that* price is also subject to the jurisdiction of the Federal Power Commission, the Commission thus could not determine petitioner's rates without first determining what price petitioner could lawfully pay Phillips for the gas purchased at the mouth of the pipeline. In Opinion No. 275, the Commission determined Phillips' lawful charge to be 7.5036 cents per Mcf and, upon that basis, fixed petitioner's rates to its customers.

Second, when Phillips filed its initial rate with the Commission, Phillips claimed a higher price (9.3796 cents)

than the Commission had just determined was proper in Opinion No. 275. In accepting this filing, therefore, the Commission pointed out specifically that the question of Phillips' authorized charges to petitioner was already in issue in the Michigan Wisconsin rate case *and would be determined upon reconsideration of Opinion No. 275* (R. 85).

At this point Phillips, although on notice that its charges to petitioner were to be reconsidered in petitioner's rate case, elected not to participate in those proceedings. Instead, it waited until the Commission issued its Opinion No. 275-A and applied that determination directly to Phillips by order of December 8, 1954 (R. 106). Then, at a time when petitioner's rates had been finally fixed at a level reflecting the Commission's determination of Phillips' lawful charges, Phillips sought—and obtained—a court decision setting aside the Commission's order of December 8, 1954 but leaving untouched Opinion No. 275-A, upon which that order was based.

The court below dismissed petitioner's contention that Phillips was in reality making an unauthorized collateral attack on Opinion No. 275-A by stating simply that "Phillips was not a party to the proceedings which purported to fix its rates" (*infra*, p. 12a).[14] That statement, since it was apparently intended as a complete answer to petitioner's contention, assumes that one cannot be bound by the order of an administrative agency if he is not a party to the proceedings in which the order was entered, even though he may have had express knowledge that his rights were there in issue.

[14] The court went on to say that, since it had determined Phillips' effective rate as of June 7, 1954 to be 8.4684 cents per Mcf, "any other rate was unauthorized and cannot be sustained" (*infra*, p. 12a). But if Phillips was bound by the Commission's decision in Opinion No. 275-A, there was no occasion to consider the merits of Phillips' claims.

In *Red River Broadcasting Company* v. *Federal Communications Commission*, 98 F. 2d 282, *cert. den.* 305 U. S. 625, the Court of Appeals for the District of Columbia held the contrary. There, the licensee of a radio station sought to appeal from an order of the Commission granting a permit to another applicant to construct a radio station in a nearby community although the appellant had not participated in proceedings before the agency. But the court held that the appellant could not attack the Commission's order after having failed to intervene to assert its rights before the Commission. In this connection the court said:

> "* * * The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself. * * * Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation."[15]

The same conclusion—that one may be bound by proceedings to which he is not a party—is implicit in this Court's decision in *Federal Communications Commission* v. *National Broadcasting Company*, 319 U. S. 239, where it was held that an existing station (KOA) whose signal would be interfered with by a new station licensed by the Commission had an absolute right to intervene in the proceedings. The necessary premise of the decision is, of course, that KOA's rights were being conclusively deter-

[15] While the appellant in the *Red River* case was attempting to appeal the order granting the permit to another, and the court's opinion is therefore cast largely in terms of exhaustion of administrative remedies, the rationale of the decision applies *a fortiori* to the instant case, where Phillips sought review, not of Opinion No. 275-A, but of a purely collateral order.

mined in proceedings relating to another station's application for a license, and that it was KOA's duty—and therefore its right—to intervene to protect its interests.

One of the very purposes of allowing intervention in administrative proceedings, as well as of requiring publication of notice, is to permit persons whose rights will be affected by agency action, *whether or not they elect to become parties,* to protect those rights before the agency and by judicial review. If an agency were somehow required to make all persons to be bound by its action formal parties to the proceedings, the administrative process would necessarily cease. Such a rule would require, for example, that all consumers be made parties to utility rate proceedings. The conclusion of the court below that Phillips cannot be bound simply because it chose not to become a party to the Michigan Wisconsin rate proceeding is squarely contrary to the cited decisions. See also, *e. g., Home Loan Bank Board* v. *Mallonee* (C. A. 9), 196 F. 2d 336, 376.[16]

The court below also stated that it could "find no warrant in the Natural Gas Act for the determination of [Phillips'] rates and charges in a proceeding to which it was not a party" (*infra,* p. 12a). But the court overlooked the fact that the matter here involved was not an application for a *change* in rates, as to which elaborate notice and hearing procedures are provided in Section 4(d) and (e) of the Act, but rather the question of Phillips' proper initial rate under Section 4(c). Indeed, the court itself pointed out elsewhere in its opinion that the Commission's

[16] Phillips cannot, of course, claim that it had no notice that its proper charges would be determined in petitioner's rate case, since the order of October 1, 1954 was specific on that point. Nor can Phillips contend that it would have been denied leave to intervene or to introduce evidence in that case, since it made no attempt to do either. *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 188; *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608, 616-17; *Red River Broadcasting Co.* v. *Federal Communications Commission,* 98 F. 2d 282, 288.

orders simply establish Phillips' rates as of June 7, 1954 and were not "entered upon evidence concerning the reasonableness of the rates" (*infra*, p. 9a). The fact is that the Act does not specify how the *initial* rate of a natural gas company shall be determined and in no way precludes determination of that question in proceedings to fix the rates of another natural gas company making purchases from the former.

In sum, the court below held that, merely because Phillips elected not to intervene in petitioner's rate case, although on notice that its initial rates to petitioner were to be determined in that proceeding, it is free later to attack the Commission's determination in collateral proceedings. This holding presents an important question of administrative law and conflicts particularly with the decision of the Courts of Appeals of the District of Columbia Circuit in the *Red River* case. Moreover, it is contrary to the basic principle underlying the right to intervene in agency proceedings, namely that the rights of one who is on notice of such proceedings may be conclusively determined therein. See *Federal Communications Commission* v. *National Broadcasting Co.*, 319 U. S. 239.[17]

2. Phillips filed its rates pursuant to Section 4(c) of the Natural Gas Act and Order No. 174-A promulgated by the Commission shortly after this court's decision in the *Phillips* case. In its rules, the Commission provided that independent producers should file rate schedules "setting forth the terms and conditions of service and all rates and charges for such transportation and sale *effective on June 7, 1954.*" The Commission further defined "rate schedule" as "the basic contract and all supplements or agreements

[17] One of the express grounds for intervention in Federal Power Commission proceedings is that the intervenor "may be bound by the Commission's action in that proceeding" (18 C.F.R. § 1.8(b)(2)).

amendatory thereof, *effective and applicable on and after June 7, 1954.*"

The court below held that determination of Phillips' "effective" rates on June 7, 1954 presented "purely questions of law involving the construction of a contract" (*infra*, p. 12a) and concluded that, as a matter of contract construction, the Commission had erred in its determination of Phillips' effective rate.

But the court refused to recognize what was plainly the fact, that the Commission, in determining an independent producer's "effective" rate on June 7, 1954, did not intend to give effect to all of the provisions of the contract, including its automatic escalation provisions. On the contrary, in Opinion No. 275, the Commission pointed out that Phillips' sales to petitioner had been "subject to our jurisdiction as of the time that such sales were first initiated in 1949," and that, in view of the invalidity of automatic escalator clauses under Section 4(d) of the Act, the Commission was not bound to give effect to such clauses in determining what rate was "effective and applicable" on June 7, 1954 (*infra*, pp. 19a-20a). The Commission then concluded that, since petitioner had not finally been allowed any increase over 28 cents per Mcf on June 7, 1954, Phillips' "effective" rate on that date should be based upon the 28 cent resale rate.

In short, the court below assumed that, when the Commission fixed a "cut-off" date of June 7, 1954 as of which the initial rates of independent producers should be determined, the Commission was required to give full effect to all provisions of Phillips' contracts in fixing its initial rates. In the court's view, therefore, the question was purely one of contract construction.

The Commission, on the other hand, took the position that, while it had as a matter of practical necessity fixed

June 7, 1954 as a cut-off date as of which initial rates of producers should be determined, the fact remained that such rates had actually been subject to the provisions of the Natural Gas Act since 1938 and that the Commission should not, therefore, give full effect to automatic price increase provisions of such contracts in determining a producer's "effective" rate as of June 7, 1954. In applying this policy, the Commission determined that it would regard the price under the escalation provision of the contract as "effective" on June 7, 1954 only if the resale rate upon which it depended had been finally determined on that date. In this case, since petitioner's rate increase applications had not finally been acted upon on that date, Phillips' "effective" rate was held to be the contract price based on petitioner's 28 cent resale rate, which had been in effect since 1950.

There is no authority whatever in the Natural Gas Act for the court's action in setting aside the Commission's determination of Phillips' "effective" initial rate and fixing a different rate based solely upon the contract. Phillips has never argued that the Commission was required to fix June 7, 1954 as a cut-off date, since this Court's decision in the *Phillips* case held that producers like Phillips had been subject to the Act since its adoption in 1938. Thus, in setting a much later date for full compliance with the Act, the Commission clearly was not prohibited from rejecting certain automatic price increases which the Act would have prevented from becoming effective. Yet the court below, without any real consideration of the matter, stripped the Commission of that authority.

The question of the respective roles of Commission and reviewing court presented by this case is one of importance in the administration of the Natural Gas Act. The action of the court below in setting aside, on principles of gen-

eral contract law, a decision of the Federal Power Commission adapting the provisions of the Natural Gas Act to the situation created by this Court's decision in the *Phillips* case is not consistent with the accepted and usual course of judicial review of administrative orders and requires exercise of this Court's supervisory powers.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

Tenth Circuit.

November Term—1955.

PHILLIPS PETROLEUM COMPANY,
Petitioner,
vs.
FEDERAL POWER COMMISSION,
Respondent.
} Number 5095.

PHILLIPS PETROLEUM COMPANY,
Petitioner,
vs.
FEDERAL POWER COMMISSION,
Respondent.
} Number 5096.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION.

Before BRATTON, MURRAH and PICKETT, *Circuit Judges.*
MURRAH, *Circuit Judge.*

These are petitions under Section 19(b) (15 USC 717r(b)) of the Natural Gas Act, 52 Stat. 821, to review and set aside orders of the Federal Power Commission, purporting to suspend certain rate schedules filed or offered for filing with the Commission for natural gas sold by the petitioner, Phillips Petroleum Company, an independent producer of natural gas, to Michigan Wisconsin

Pipe Line Company, for resale. While the appeals were consolidated and come to us on one record, only one question of law is common to both cases, and we will therefore consider them separately.

NUMBER 5096.

An historical statement is essential to a clear perception of the questions involved. On December 11, 1945, and before Michigan commenced operations, Phillips entered into a contract with it for the sale of natural gas, to be delivered at its Hansford County, Texas processing plant. This review is concerned only with the production and sale of natural gas from lands referred to in the contract as "dedicated acreage". The contract, as amended December 1, 1949, provided for a base price of 6.6997¢ per mcf, to be escalated in the same ratio as Michigan's resale rates exceeded 25¢ per mcf, if the Bureau of Labor Statistics Wholesale Price Index was thirty points higher than its December 1934 level, but in no event would Phillips' price during the first five years be less than 7.5930¢ per mcf. Until March 1951, Phillips' sale price to Michigan under the contract was the minimum. In that month, however, Michigan applied for an increase in its rates from 28¢ to 31.5¢ per mcf. This rate was suspended by the Commission under Section 4(e) of the Act, 52 Stat. 822, 15 USC 717c(e), and a hearing to determine a reasonable rate was ordered under Docket No. G-1678. While that case was pending, and in October 1951, the suspension order having expired under Section 4(e), Michigan began charging its customers the increased rate of 31.5¢ under bond to refund any portion of the increased rates ultimately found not to be justified after the hearing. In accordance with the "formula in the contract" between Phillips and Michigan, the parties entered into a letter agreement, under

the terms of which Phillips' unregulated rates to Michigan were adjusted upwards in ratio to Michigan's increased rates, subject to refund to the extent that Michigan's increased rates were not sustained by the Commission. The formula prescribed in the contract gave Phillips a rate of 8.4416¢ per mcf (31.5/25 x 6.6997) for its unregulated sales to Michigan.

In June 1952, and while the first proceedings were still pending, Michigan filed another application for a further rate increase from 31.5¢ to 35¢ per mcf. This rate was also suspended and a hearing ordered under Docket No. G-1996. Upon the expiration of the statutory suspension period (December 12, 1952), Michigan commenced charging its customers the increased rate of 35¢, and thereupon entered into another like letter agreement with Phillips providing for an upward adjustment of Phillips' sale price in accordance with the escalator clause of its original contract, as amended. Effective January 1953, Michigan accordingly paid Phillips 9.3753¢ per mcf for its gas, subject to refund to the extent that Michigan's increased rate was not ultimately sustained by the Commission. And, Phillips was being paid this unregulated contract rate for its sales to Michigan when, on June 7, 1954, it was authoritatively determined that such sales were within the regulatory jurisdiction of the Commission. See *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672.

In recognition of its newly established jurisdiction, the Commission, on August 6, 1954, promulgated additional regulations in which it established June 7, 1954 as the arbitrary cut-off date on which all rate schedules for the sale of natural gas or services subject to the jurisdiction of the Commission were frozen. Every independent producer of natural gas subject to the jurisdiction of the Commission was ordered to, on or before October 1, 1954, file

with the Commission rate schedules setting forth the terms and conditions of service and all rates and charges for such transportation and sale of natural gas effective on June 7, 1954, to be evidenced by a statement showing actual billings for a recent month; and it was further provided that no change could be made in any such rate schedules without first filing a change in rates at least thirty days before the effective date thereof pursuant to Section 4(d) of the Natural Gas Act and the applicable regulations. And, "rate schedule" was specifically defined as the basic contract and all supplements or agreements amendatory thereof effective and applicable on or after June 7, 1954. See Regulations 154.92-4, 19 F. R. 5081.

In compliance with these regulations, Phillips filed numerous contracts with amendments and supplements reflecting rates and charges in effect on June 7, 1954 for the wholesale of natural gas subject to the jurisdiction of the Commission. Among the contracts filed on August 31, 1954 as Rate Schedule No. 4 was the contract with Michigan dated December 11, 1945, together with the amendments of August 9, 1948 and December 1, 1949 and the letter agreements of October 31, 1951 and January 15, 1953. As a part of the same schedule, Phillips filed changes in its rate schedule to permit it to recover, in accordance with its contract with Michigan, seventy-five percent of the increase in the Texas gross production tax, effective September 1, 1945. The letter agreements were denominated by the Commission as Supplements Nos. 8 and 11. The proposals for rate increases to cover the increases in the Texas gross production tax were denominated Supplements Nos. 1 to Supplements Nos. 6 and 7.

On September 30, 1954, the thirtieth day after the filing of Rate Schedule No. 4, the Commission sent a telegram to Phillips stating: "Supplemental rate schedule filed on

August 31, 1954 suspended pending investigation and further order of the Commission. Two orders follow by mail." On the next day, October 1st, the Commission entered a formal order reciting that the "rate increases proposed by Phillips in Supplements Nos. 8 and 11 [the two letter agreements] and Supplements Nos. 1 to Supplements Nos. 6 and 7 [pertaining to the recovery of the Texas excise tax] to FPC gas rate Schedule No. 4 has not been shown to be justified and may be unjust, unreasonable and otherwise unlawful." And, "furthermore, the rate increases proposed in Supplements Nos. 8 and 11 relate to matters considered in Opinion No. 275 *In the Matter of Michigan Wisconsin Pipe Line Company,* Dockets Nos. G-1678 and G-1996, and accompanying order issued July 30, 1954." The Commission having granted a rehearing in Opinion No. 275, and Phillips' wholesales to Michigan having become jurisdictionally relevant to Michigan's resales, it was deemed "proper and in the public interest that pending such reconsideration the rate increases filed by Phillips applicable to gas purchased by Michigan be suspended." Treating the letter agreements (Supplements Nos. 8 and 11) as proposals for rate increases not in effect June 7, 1954, the Commission suspended the rates being collected in accordance therewith, and ordered a hearing "concerning the lawfulness of the rates, charges, classifications and services contained in Phillips FPC Gas Rate Schedule No. 4, as supplemented, as proposed to be further supplemented by Supplements Nos. 8 and 11 and Supplement Nos. 1 to Supplements Nos. 6 and 7."

On rehearing, the Commission entered its second order of December 8, 1954, modifying in part its prior order of October 1st. After referring to and quoting from its prior order concerning the relevancy of Phillips' wholesales to Michigan's resales, the Commission noted that since its October 1st order, it had, on November 29th issued its

Opinion No. 275A and accompanying order modifying its prior Opinion No. 275, in which it recognized that failure to accord Phillips some increase in its sale price under the escalator clause of its contract "would carve out an unwarranted exception to the policy established" under its applicable regulations, and would "be somewhat unfair to Phillips when compared to the treatment accorded other independent producers * * *." The Commission accordingly found that on the basis of equal treatment with other producers, Phillips was equitably entitled to a rate which would give effect to Michigan's resale rate of 31.25¢, which the Commission had found to be proper in its Opinion No. 275A. Phillips was accordingly granted permission to file a new supplement to its FPC Gas Rate Schedule No. 4 to reflect as of June 7, 1954 a rate of 8.374¢ for its gas sales involved in this appeal. And, Supplements Nos. 1 to Supplements Nos. 6 and 7 providing for increase in rates based upon the increase in the Texas gross production tax, were allowed to take effect, provided that the filing of the new supplemental rate schedule should in no way affect the pending proceedings involving Phillips' wholesale rates to Michigan.

After denial of the petition for rehearing, Phillips tendered a timely conditional rate schedule, which the Commission found did not comply with the requirements of its order of December 8, 1954 by reason of which the tendered filing was rejected. Petitions for rehearing on the Commission's orders of October 1, 1954 and December 8, 1954 having been denied, Phillips filed its timely petitions for review here.

The first contention is to the effect that the order of October 1st, not having been entered within the thirty-day statutory period from the date of the filing of the rate schedules on August 31st, was ineffectual under Section

4(e) of the Act to suspend the rate filings. Section 4(e) provides in presently material part: "Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; * * *." It is of course true that the Commission is empowered under this Section to suspend rates only before they become effective, and that they become effective thirty days after filing. The question then arises whether the telegram dispatched to Phillips within the statutory period can be said to meet the statutory requirements.

The obvious purpose for granting suspension powers to the Commission was to provide a status quo of five months during which the Commission could investigate the reasonableness of the proposed new rate schedule. And while concededly the Commission was required to act to suspend the rates within thirty days from the filing, the statute prescribes no form of notice or order beyond the requirement that it shall be "a statement in writing of its reasons for such suspension", and that it shall be filed with the schedules and delivered to the natural gas company affected. There is no reason to imply a technical concept of the notice of suspension. It would seem sufficient if the natural gas company is apprised of the suspension in writing in order that the commencement of the period of status quo may be definitely fixed for the governance of the parties. A telegram is certainly a "writing" within the

meaning of the statute. It referred to the rate schedules filed on August 31st and it stated that they were suspended. The statute also requires a reason for such suspension, and the telegram stated that the schedules were suspended pending investigation and further order of the Commission, and that "two orders follow by mail." The order which followed the next day was merely an amendment or enlargement of the reasons for the suspension order promulgated within the thirty-day period. We think it related back to the telegram, and, considered together met the statutory requirements.

The Commission challenges the reviewability of the suspension orders for lack of requisite finality and definitiveness. Section 19(b) of the Act authorizes review of "an order issued by the Commission." Reviewability is thus not strictly limited to final orders. But the courts have been traditionally careful not to interfere with the administrative process, confining review to "orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence * * *." *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375. See also *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Columbia System* v. *United States*, 316 U. S. 407; *C. & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103; *Isbrandtsen, Inc.* v. *United States*, 211 F. 2d 51; *Arrow Airways* v. *Civil Aeronautics Board*, 182 F. 2d 705; *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F. 2d 796. But, "The ultimate test of reviewability is not found in an overrefined technique." *Columbia System* v. *United States, supra*, p. 425. And, reviewability extends to an order issued by the Commission which finally determines the legal rights of the parties with respect to matters within the scope of review. See *Atlantic Seaboard Corp.* v. *Federal Power*

Commission, 201 F. 2d 568; *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F. 2d 334.

The orders sought to be reviewed here do not deal with the merits of the proceedings before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge Michigan on June 7, 1954 and thereafter until changed by order of the Commission pursuant to hearing. The correctness of that order depends upon the legal effect of the writings between the parties. If they are to be considered together as one contract to establish an applicable and effective rate on June 7, 1954, the Commission obviously had no power to suspend it. If, on the other hand, the letter agreements are to be construed apart from the amended contract as mere proposals for rate increases, the Commission was empowered to suspend such rates. In any event, the legal consequences which attach to these orders have conclusive effect upon the rights and duties of Phillips as an independent producer under the Natural Gas Act and they are therefore reviewable.

This brings us to a construction of the gas sales contract as of June 7, 1954, and more particularly the legal effect of the escalator clause of the contract as amended, and as construed and applied in the letter agreements denominated in the Commission's order as Supplements Nos. 8 and 11. Throughout these proceedings the Commission has taken the position that in view of the contingency of the rates charged by Phillips on June 7, 1954 under the letter agreements, they could in no sense be said to be effective rates on that crucial date. Indeed, the

Commission took the position that no escalator provisions in a gas purchase contract between Phillips and Michigan could effect an automatic change in the price which Phillips could charge.

And, this conclusion is said to be entirely consistent with its historically approved policy of suspending all automatic rate increases provided for in escalator clauses of contracts filed as rate schedules, on the grounds that such clauses constituted a new schedule or change in rates under Section 4(d). And see *In the Matter of United Gas Pipe Line Co.*, Docket No. G-144 (2 FPC 723), issued Nov. 20, 1939; *In the Matter of Southern Carbon Co.*, Docket No. G-145 (2 FPC 725), issued Nov. 20, 1939; *In the Matter of Interstate Natural Gas Co., Inc. and Hope Producing Co.*, Docket No. G-146 (2 FPC 272), issued Nov. 20, 1939; and *In the Matter of Mississippi River Fuel Corp.*, Docket No. G-150 (2 FPC 170), issued Dec. 28, 1939, affm'd 121 F. 2d 159. But, it is one thing to treat an escalated rate effective after June 7, 1954 as a change in rate or new schedule. It is quite another to treat a rate already in force on June 7, 1954 by virtue of the automatic provisions of an escalator clause in a contract as a new schedule or change in rates.

It is true, as the Commission argues, that the rate paid Phillips on June 7, 1954 under its contract was tentative in the sense that it was contingent upon the ultimate resale rate established by the Commission for Michigan. But it was nonetheless in force and effect and was being paid not by force of the letter agreements, but by force of the binding effect of the escalator clauses which operated to fix the prescribed rate in accordance with the formula in the contract. The letter agreements were merely executory of the contract between the parties. The contract and letter agreements were entered into at a time when

the parties were free to contract with respect to the sale of gas, and the fact that they were contingent upon Michigan's regulated resale rate does not make them any the less applicable and effective to the extent that the regulatory process permitted. When the Commission ultimately determined Michigan's rates to be 31.25¢ per mcf from September 1951 to December 1952, and 31.60¢ thereafter, Phillips' wholesale rate, effective June 7, 1954, was finally and definitely established under the contract. It was less than what they were collecting and Phillips has made refunds in accordance with its contracts. It is significant that the Commission's regulations provided for the filing of all contracts, amendments and supplements as a part of the rate schedules required to be filed reflecting rates applicable on June 7, 1954. The contracts and amendments, including the letter agreements, were filed with the Commission in accordance with the regulations as one rate schedule; they were integrated parts of one contract, the terms and conditions of which operated to establish a determinable rate of 8.4684¢ as of June 7, 1954, and that rate being applicable and effective on that date, is not subject to suspension under Section 4(e).

Michigan has intervened to contend that the rate order pursuant to Opinions 275 and 275A (*In the Matter of Michigan Wisconsin Pipe Line Co.*, Dockets Nos. G-1678 and G-1996) the substance of which we have already recited, operated to conclusively establish the rate which Phillips could charge Michigan, and that this petition is therefore an unwarranted collateral attack on that rate order. On the basis of Michigan's adjudicated resale rate of 31.25¢ per mcf from September 1951 to December 1952, the Commission allowed Phillips a rate, effective June 7, 1954, of 8.374¢, and using that wholesale rate as a cost basis, the Commission allowed Michigan a resale rate of 31.60¢ from and after December 12, 1952. The rate thus

allowed Phillips bore no relationship to the contracts in force on June 7, 1954, but was concededly an equitable gratuity, justified only as an authorized administrative adjustment. Phillips was not a party to the proceedings which purported to fix its rates, and we can find no warrant in the Natural Gas Act for the determination of its rates and charges in a proceedings to which it was not a party. Moreover, since we hold that Phillips' applicable and effective rate on June 7, 1954 was 8.4684¢, it follows that any other rate was unauthorized and cannot be sustained.

We hold, therefore, that the orders of October 1st and December 8th were timely; that they were subject to review under Section 19(b) as presenting purely questions of law involving the construction of a contract; that the original contract, as amended, together with the letter agreements are all integrated parts of one contract, the escalator provisions of which operated to establish Phillips' wholesale rate to Michigan effective June 7, 1954, and such rates are therefore not suspendable under Section 4(e); that in its order of December 8th, the Commission has in effect upon its own motion entered upon an authorized investigation of Phillips' rates to Michigan; that it has full authority to inquire into their reasonableness, subject to the effective contract rate on June 7, 1954, and to make appropriate and appealable orders therein; that the orders pursuant to Opinions Nos. 275 and 275A have no binding effect upon the issues involved here.

NUMBER 5095.

This petition involves only the timeliness and legal sufficiency of the Commission's telegraphic notice on September 30, 1954, reference to which has already been made in Number 5096. What we have said there is dispositive of the question here, and it is so ordered.

APPENDIX B.

Pertinent Provisions of the Natural Gas Act (15 U. S. C. §§ 717, et seq.).

Sec. 4(c). Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Sec. 4(d). Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

Sec. 4(e). Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: Provided, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest,

the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

APPENDIX C.

Excerpts from Opinion No. 275, In the Matters of Michigan Wisconsin Pipe Line Company, Docket Nos. G-1678 and G-1996, July 30, 1954.

The Phillips Decision

On June 7, 1954, the United States Supreme Court handed down its opinion in the *Phillips* case[10] affirming the decision of the Court of Appeals for the district of Columbia that the Phillips Petroleum Company is a 'natural-gas company' within the meaning of that term as used in the Natural Gas Act.

The Supreme Court's decision puts to rest any doubt with respect to our jurisdiction over the rates charged by Phillips for the sale of natural gas to Michigan-Wisconsin. There is thus now injected into these proceedings the basic issue of purchased gas costs allowable in Michigan-Wisconsin's costs of service in these dockets. That issue requires a determination on our part of the treatment which should be given to the escalator clause provisions contained in Michigan-Wisconsin's gas purchase contracts with Phillips.

Michigan-Wisconsin's purchases of natural gas from Phillips are billed under the terms of an initial contract dated December 11, 1945, and subsequent amendments thereto (Exhibits 32 through 42) provided for billing of approximately two-thirds of those purchases under the terms of a contract relating to deliveries from dedicated

[10] *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, Nos. 280, 281, 418, October Term, 1953, decided June 7, 1954, affirming 92 U. S. App. D. C. 284, 205 F. 2d 706, which reversed 10 F.P.C. 246.

acreage (Exhibit 38), and the remaining one-third under the terms of a contract relating to deliveries from the Stratford Acreage (Exhibit 40).

The two amendatory contracts (Exhibits 38 and 49), each dated December 1, 1949, establish, respectively, a base price of 6.6997¢ per Mcf[11] for deliveries from the dedicated acreage and a base price of 8.9330¢ per Mcf[11] for deliveries from the Stratford Acreage, through the year 1954, subject, in each instance, to an approximate 0.9¢ increase per Mcf each five-year period thereafter. In addition, the contract relating to the dedicated acreage provides for escalator increases in the unit price per Mcf in the same ratio as the effective rate for sale of gas by Michigan-Wisconsin is established at a rate higher than 25¢ per Mcf.[12] The amended contract relating to deliveries from

[11] At a pressure base of 14.65 psia.

[12] The original contract of December 11, 1945, between Michigan-Wisconsin, as Buyer, and Phillips, as Seller, after setting out the base unit prices to be paid during each five-year period of the contract term, further provides, in part (Article VIII (2)):

> In order to protect the parties hereto from too great burden under the price provisions of this contract * * * it is agreed that * * * adjustment of the prices to be paid by Buyer to Seller for gas hereunder shall be made as herein provided. Using as a standard the Federal Bureau of Labor's Statistical Annual Index of Wholesale Prices of All Commodities, based upon 1926 prices as 100% and defining the word "point" as used herein to mean 1% of the 1926 prices, it is agreed that no adjustment shall be made unless and until the said Annual Index shall be more than thirty points above or below the level indicated by said Annual Index on the date of this contract (hereinafter referred to as the present level), and unless and until Buyer, and distributors which buy at least fifty per cent of all gas sold by Buyer to distributors for resale, shall have had a general increase or decrease in their respective rates for gas sold by them. However, if when the said Annual Index is more than thirty points above the present level, the Federal Power Commission, and other authorities having jurisdiction, shall grant to Buyer and such distributors a general increase in their respective rates for gas sold by them, it shall be conclusively presumed that such increase is due to inflation and the prices for gas hereunder shall be increased in proportion to the increase in Buyer's rates; * * *

the Stratford Acreage further provides for equalization of the unit prices per Mcf from both acreages whenever the unit price for deliveries from the dedicated acreage, as escalated, is greater than the unit price being paid for gas from the Stratford Acreage.

The adjustment provision quoted above, revised in certain aspects, has been continued through various amendments of the original contract, including the latest amendment dated December 1, 1949 (Exhibit 38). That last amendment, which for the first time gears the adjustment provision to a specific 25¢ per Mcf effective rate for gas sold by Michigan-Wisconsin for resale, reads as follows:

> (2) In order to protect Seller from too great burden under the price provisions of this contract in the event of abnormal inflation of prices of commodities generally, it is agreed that * * * an adjustment of the prices to be paid by Buyer to Seller for gas hereunder shall be made as herein provided. Using as a standard the Federal Bureau of Labor Statistics' Annual Index of Wholesale Prices of All Commodities for any calendar year, based upon or adjusted to 1926 prices as 100 and defining the word 'point' for the purpose hereof to mean one per cent of the 1926 prices, it is agreed that no adjustment shall be made unless and until (1) the Annual Index shall be more than thirty (30) points above the level (104.0) indicated by the Annual Index on December 11, 1945, and (2) Buyer shall have effective rates above 25¢ per Mcf for gas sold by it for resale. If rates above said 25¢ per Mcf shall be effective during any adjustment period, the price of gas delivered hereunder shall be adjusted to a price which bears the same ratio to the price provided in Section 1 of this Article VIII as the effective rates bear to 25¢ per Mcf. * * *

Under the respective base prices of 6.6997¢ and 8.9330¢ per Mcf in effect during the test periods in these dockets, the equalization provision of the Stratford Acreage con-

tract would not be applicable unless the effective rate for gas sold by Michigan-Wisconsin is established at 33⅓¢ per Mcf, or more (Exhibit 184).

Section 4(d) of the Natural Gas Act states:

> Unless the Commission otherwise orders, no change will be made by any natural-gas company in any such rate, charge, classification, or service, or any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.

The principle that a natural-gas company may not charge or accept any rate other than the filed rate which is effective in accordance with the requirements of the regulatory statute—here Section 4 of the Natural Gas Act and Part 154 of the Regulations—is now firmly established.[13] Moreover, this principle is unaffected by the fact that the rate schedule has not been filed, because it cannot be avoided by failure to comply with the filing requirements of the regulatory statute. *Far East Conference* v. *United States,* 342 U. S. 570, 572, note 4; *United States Navigation Co.* v. *Cunard Steamship Co.,* 284 U. S. 474, 486-487; *Wisconsin-Michigan Power Co.* v. *F. P. C., supra; Wisconsin Power & Light Co.* v. *F. P. C., supra.*

The Supreme Court's decision in the *Phillips* case, clearly indicates that the rates and charges of that Company for the sale in interstate commerce of natural gas for resale to Michigan-Wisconsin are subject to our jurisdiction as of the time that such sales were first initiated in 1949.

The purchased gas costs claimed by Michigan-Wisconsin

[13] *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.,* 162 F. 2d 388, *certiorari denied,* 332 U. S. 770; *Northwestern Public Service Co.* v. *Montana Dakota Utilities Co.,* 181 F. 2d 19, affirmed 314 U. S. 246; *Wisconsin Power & Light Co.* v. *F. P. C.,* 301 F. 2d 183, *certiorari denied,* 345 U. S. 934; *Wisconsin-Michigan Power Co.* v. *F. P. C.,* 197 F. 2d 472, *certiorari denied,* 345 U. S. 934; *Mondakota Gas Co.* v. *Montana Dakota Utilities Co.,* 103 F. Supp. 606; *McLellan* v. *Montana Utilities Co.,* 104 F. Supp. 46.

in Docket Nos. G-1678 and G-1996 include in the price to be paid to Phillips per Mcf of gas purchased increases which give effect to the escalator clause provisions summarized above based on the rates proposed by Michigan-Wisconsin for sales to its customers.

Any provision in a gas purchase contract which provides for an increase based on the rates to be charged by the purchaser for the sale of such natural gas in interstate commerce for resale is inconsistent with the standards of the Natural Gas Act and contrary to the public interest as a matter of law, to say nothing of the fact that a change in rates, under no circumstances, may be made effective except in accordance with Section 4(d) of the Act

Appropriate rules and regulations were issued on July 16, 1954, to implement existing regulations and facilitate compliance with the provisions of the Natural Gas Act by independent producers and gatherings which are also natural-gas companies. Changes in rates and charges by such independent producers can be lawfully accomplished only by compliance with such regulations and the provisions of the Natural Gas Act.

Under the rate increase filings by Michigan-Wisconsin in these dockets, the rates being collected under bond are only tentative and there are no effective rates for gas sold for resale as far as Michigan-Wisconsin is concerned until the order of this Commission in these dockets becomes final. Accordingly, the intervention of the *Phillips* decision and the provisions of Section 4(c) of the Natural Gas Act make it clear beyond all question that Phillips may not lawfully exact any increase in rates from Michigan-Wisconsin other than in the manner provided by the Act and the Rules and Regulations of the Commission. The only effective rate which Michigan-Wisconsin has ever established for the sale of gas for resale is 28¢ per Mcf and

we have allowed rates to Phillips based on that price. No escalator provision in the gas purchase contract between Phillips and Michigan-Wisconsin can now effect an automatic change in the price which Phillips may charge.

We find and determine that the increased costs of gas purchased as claimed by Michigan-Wisconsin in these dockets to the extent that they are based upon the operation of the escalator clauses, should be disallowed.

Immediately prior to the date on which the increased rates proposed in Docket No. G-1678 were made effective, subject to refund, the cost to Michigan-Wisconsin of gas purchased from Phillips from the dedicated storage was 7.547¢ per Mcf at 14.735 psia. This unit price was derived under the adjustment provisions quoted above based on the then effective single straight rate of 28¢ per Mcf.

At the same time the cost to Michigan-Wisconsin for gas from the Stratford Acreage was 8.9848¢ per Mcf at 14.735 psia (8.9330¢ per Mcf at 14.65 psia) as specifically provided in that contract and was not affected by the adjustment provision applicable to gas purchased from the dedicated acreage.

For the purpose of determining Michigan-Wisconsin's purchased gas costs in these proceedings we adopt and apply to the respective quantities of natural gas purchased from each of the acreages the appropriate unit prices of 7.547¢ per Mcf and 8.9848¢ per Mcf.

While the unit price we are here recognizing as the valid cost of gas purchased from the dedicated acreage reflects a change in rates which may not be made effective by a company subject to the jurisdiction of the Commission except in accordance with Section 4 of the Natural Gas Act, that change occurred approximately 4 years prior to the determination by the Court of Appeals that the rates and charges of Phillips are subject to our jurisdiction.

Moreover, it does not appear to us that it would be appropriate in the present circumstances to go behind the cost of natural gas to Michigan-Wisconsin from Phillips based on the effective rate of 28¢ per Mcf charged by Michigan-Wisconsin immediately prior to its filing in Docket No. G-1678, since the funds impounded and subject to refund in both dockets are based upon the difference between the effective rate of 28¢ per Mcf and the increased rates proposed in each docket."

APPENDIX D.

Opinion No. 275-A, In the Matters of Michigan Wisconsin Pipe Line Company, Docket Nos. G-1678 and G-1996, November 29, 1954.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION.

Before Commissioners:

Jerome K. Kuykendall, Chairman; Claude L. Draper, Nelson Lee Smith, Seaborn L. Digby and Frederick Stueck.

In the Matters of Michigan Wisconsin Pipe Line Company. } Docket Nos. G-1678 and G-1996.

OPINION No. 275-A.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART APPLICATION FOR MODIFICATION OR FOR REHEARING AND STAY OF OPINION AND ORDER.

Michigan Wisconsin Pipe Line Company (Michigan Wisconsin) in its "Application for Modification of Opinion and Order or, in the Alternative, for Rehearing and Stay," filed on August 27, 1954, states that the Commission obviously intended in its Opinion No. 275 and accompanying order to allow it to collect from its customers its actual

costs of gas purchased from Phillips. Such costs are a proper element in determining cost of service. As stated in that opinion Michigan Wisconsin purchases gas from Phillips from what may be generally termed (1) "Dedicated acreage," and (2) "Stratford acreage." As pointed out in Opinion No. 275, the base price in the contract relating to the dedicated acreage was 6.6997¢ per Mcf at 14.65 psia. That price was based on the assumption that Michigan Wisconsin's resale rate would be 25¢ per Mcf. The contract further provided that the 6.6997¢ per Mcf was to be escalated in the ratio which Michigan Wisconsin's future resale rates might bear to 25¢ per Mcf but that the price should not, in any event, be lower than 7.5930¢ per Mcf at 14.65 psia. The gas from the Stratford acreage carries a price of 8.9330¢ per Mcf at 14.65 psia. While this contract also has escalator provisions, they do not become effective unless and until Michigan Wisconsin's resale rate exceeds 33⅓¢ per Mcf. That condition does not arise under the circumstances present in this case and in determining the price which Michigan Wisconsin must pay to Phillips, we need here be concerned only with gas purchased from what is known as the "Dedicated acreage" in so far as we are dealing with the inflation escalator provision. From this Dedicated acreage and under the contract relating to such purchase Michigan Wisconsin receives approximately two-thirds of its gas supply.

Prior to the time Michigan Wisconsin began operations in 1949, it filed with the Commission an interim rate of 30¢ per Mcf. That interim rate became effective at the time of initial operations. Subsequently, as a result of our order issued January 30, 1950, in Docket Nos. G-1156 and 1302, Michigan Wisconsin filed a rate of 28¢ per Mcf, effective February 7, 1950. With a 28¢ rate for Michigan Wisconsin, the rate for Dedicated acreage gas sold by Phillips was under the contract as amended December 1,

1949, 7.5930¢ per Mcf at 14.65 psia since the 6.6997¢ per Mcf at 14.65 psia escalated at 28¢ per Mcf would be lower than 7.5930¢ per Mcf at 14.65 psia.

Thus, 7.5930¢ per Mcf at 14.65 psia was the price collected by Phillips for gas delivered from the Dedicated acreage from February 7, 1950, until Michigan Wisconsin began collecting increased rates under bond under its rate increase filings in Docket Nos. G-1678 and G-1996. At that time Michigan Wisconsin entered into a letter agreement with Phillips under which it agreed to pay increased rates to Phillips based upon the application of the formula in its contract covering purchase of gas from the Dedicated acreage, so that under the applicable formula the contingent rate paid Phillips for gas from the Dedicated acreage while rates involved in Docket No. G-1678 were pending would be 6.6997¢ x 31.5/25 at 14.65 psia. When Michigan-Wisconsin began collecting rates under bond in Docket No. G-1996, the contingent rate paid Phillips became the resultant obtained from the formula, 6.6997 x 35/25 at 14.65 psia. Under this latter formula the resultant contingent rate applied to gas from both Dedicated and Stratford acreage.

The letter agreements[1] between Michigan-Wisconsin and Phillips provided that, since Michigan Wisconsin was collecting the rates for which it filed in Docket Nos. G-1678 and G-1996, under bond, with an obligation to repay any excess which the Commission might find not justified, Phillips would likewise refund to Michigan-Wisconsin whatever amount Michigan-Wisconsin might have paid to Phillips in excess of the correct amounts predicated upon the ultimate determination of the Commission in the proceedings involved in Docket Nos. G-1678 and G-1996.

[1] Exhibit 42 in this proceeding as to Docket No. G-1678 proceedings and letter agreement dated January 15, 1953, as to Docket No. G-1996 and referred to by Michigan-Wisconsin on page 3 of its application.

Michigan-Wisconsin in its application for modification of Opinion No. 275 and accompanying order, or for rehearing and stay respecting such opinion and order, contends that the rate which it is obligated to pay Phillips under its contract relating to the Dedicated acreage during the period that rates involved in Docket No. G-1678 were in effect under bond would be the rate developed by the following formula: 6.6997¢ x 31.5/25 x 1.0058,[2] even though the Commission found in Opinion No. 275 and accompanying order that during the period from October 1, 1951, through December 11, 1952, when Michigan-Wisconsin was collecting rates involved in Docket No. G-1678 under bond, the just and reasonable resale rate which Michigan-Wisconsin might collect was only 31.19¢ per Mcf. As an actual matter of fact the Commission, in determining the rate of 31.19¢ per Mcf, actually determined the cost of gas to Phillips by applying the following formula: 6.6997¢ x 28/25 x 1.0058 or 7.547¢. With respect to the period from and after December 12, 1952, the Commission found that the just and reasonable resale rate which Michigan Wisconsin might charge its customers during the period that rates under Docket No. G-1996 were in effect under bond, was 30.85¢ per Mcf. Here again Michigan Wisconsin contends that the proper rate payable to Phillips is a rate developed by the application of the following formula: 6.6997¢ x 35/25 x 1.0058. Likewise, in determining the just and reasonable rate of 30.85¢ per Mcf for the period from and after December 12, 1952, the Commission utilized the following formula: 6.6997¢ x 28/25 x 1.0058 or 7.547¢ per Mcf. In employing the escalation formula above to determine the 7.547¢ per Mcf price shown, we were in error. As noted at page 2, *supra*, and as pointed

[2] The factor of 1.0058 is required to convert prices at 14.65 psia under Phillips' contracts to prices at 14.735 psia, the pressure base employed by Michigan-Wisconsin.

out in Michigan Wisconsin's petition for rehearing, the proper price under the contract is 7.5930¢ per Mcf at 14.65 psia. This will require a correction in the costs of service pertaining to both Docket Nos. G-1678 and G-1996, with the necessary change to reflect such corrected costs in the ordered rates.

The price which Michigan-Wisconsin paid to Phillips from February 7, 1950, to October 1, 1951, was 7.637¢ per Mcf at 14.735 psia.[3] We find that the continuation of this rate as the cost of gas to Michigan-Wisconsin for the determination of cost of service during the suspension period in Docket No. G-1678, October 1, 1951, to December 12, 1952, is proper. The required correction in the cost of service in Docket No. G-1678 is set forth in Appendix E hereto, and indicates that application of the price of 7.637¢ per Mcf for gas from the Dedicated Acreage results in a total cost of service in the docket, as corrected, of $30,263,201, or $65,874 greater than the cost of service previously determined in that docket (see page 59 of Opinion No. 275). Appendix E further indicates that based on the corrected cost of service in the amount of $30,263,201 applied to total sales of 96,823,681 Mcf in the test period in Docket No. G-1678 the average rate per Mcf in that docket is 31.25¢ per Mfc, which we now find and determine to be the just and reasonable rate applicable to sales by Michigan-Wisconsin during the period October 1, 1951, to December 12, 1952.

When we issued Order No. 174-A on August 6, 1954, it was based primarily upon our conclusion that from and after the decision of the Supreme Court in the Phillips case, it was necessary and proper in the reasonable administration of the Natural Gas Act to establish some cut-

[3] The price of 7.637¢ results from the conversion of the price of 7.5930¢ per Mcf at 14.65 psia stated in the contract to a pressure base of 14.735 psia.

off date and recognize as of that date the established firm price being paid under gas purchase contracts. Accordingly, we provided for the filing of rates in effect on June 7, 1954, the date of the Phillips decision. The establishment of rates in effect on June 7, 1954, necessarily involved the recognition in many cases of past increases resulting from escalator provisions, favored-nation clauses or contract renegotiations, as provided for in the gas purchase contracts then in effect. We feel that failure to recognize some increase in the price of gas to Phillips would carve out an unwarranted exception to the policy established by our Order No. 174-A and be somewhat unfair to Phillips when compared with the treatment which we accorded other independent producers which are also natural-gas companies.

We find that on the basis of equal treatment with other producers which have been accorded their effective June 7, 1954, rates, Phillips is in equity entitled to a rate which will give effect to Michigan-Wisconsin's resale rate of 31.25¢ per Mcf which we have found to be proper in Docket No. G-1678. The resultant rate is 8.423¢ per Mcf at 14.735 psia for gas from the Dedicated Acreage. Using that rate to figure the cost of gas in determining Michigan-Wisconsin's cost of service in Docket No. G-1996, we find that a fair and reasonable rate, applicable to sales for resale by Michigan-Wisconsin from and after December 12, 1952, is 31.60¢ per Mcf.

This will require some modification of the Commission's order issued October 1, 1954, suspending certain of Phillips' rates. Such action will be entered in the appropriate docket (No. G-3176).

There are attached hereto and incorporated herein an Appendix "A" entitled "Calculation of Income Taxes, etc." and an Appendix "E" entitled "Cost of Service"

(in substitution for Appendix "A" and page 59, respectively, in Opinion No. 275), which set forth the computations showing the effect in Docket No. G-1678 of the correction for the minimum contract price.

There are also attached hereto and incorporated herein an Appendix "B" entitled "Purchased Gas Cost," and Appendix "C" entitled "Recalculation of Income Taxes, Return and Amount of Federal Income Taxes Available for Working Capital," and an Appendix "D" entitled "Cost of Service" (in substitution for Appendices "B" and "C" and page 74, respectively, as included in Opinion No. 275, applicable to Docket No. G-1996) setting forth the computations showing the effect of the application of the formula of 6.6997¢ x 31.25/25 x 1.0058 (or 8.423¢ per Mcf at 14.735 psia) to the volumes of gas purchased from the Dedicated Acreage and the adjustment for the Oklahoma minimum wellhead price order referred to in our clarification in this docket issued August 7, 1954.

Based on the foregoing, we now find, as set forth at Appendices "B", "C", and "D" hereto, that the proper cost of service for the determination of just and reasonable rates in Docket No. G-1996 totals $34,949,422. Application of that cost of service as now determined to the 110,595,000 Mcf of annual sales, adopted in our original opinion as the estimated designed capacity of Michigan-Wisconsin's system, results in an average rate of 31.60¢ per Mcf, which we now find and determine is the just and reasonable rate to be charged by Michigan-Wisconsin to all of its customers effective on and after December 12, 1952.

Accordingly, we find that paragraphs "C" and "D" of our order issued July 30, 1954, accompanying Opinion No. 275, should be modified to the extent and only to the extent of substituting therein the figures 31.25¢ for the figures 31.19¢ and substituting the figures 31.60¢ for the fig-

ures 30.85¢ and applying the time limits set in that order to the date of issuance of the order herein, and in all other respects the application filed by Michigan-Wisconsin on August 27, 1954, should be denied.

The Commission *orders:*

(A) Paragraphs "C" and "D" of the order issued July 30, 1954, accompanying Opinion No. 275, hereby are modified to the extent and only to the extent of substituting therein the figures 31.25 cents for the figures 31.19 cents and substituting the figures 31.60 cents for the figures 30.85 cents and applying the time limits there set to the date of issuance of this order.

(B) The application filed herein by Michigan-Wisconsin Pipe Line Company, pursuant to the provisions of Section 19 of the Natural Gas Act, for modification or rehearing and stay of Opinion No. 275 and accompanying order issued July 30, 1954, be and the same hereby is denied, except to the extent hereinabove provided.

By the Commission.

J. H. GUTRIDE,
Acting Secretary.

Adopted: November 23, 1954.

Issued: November 29, 1954.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1955.

No. 684

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The orders of the Federal Power Commission (R. 83-86, 106-110) are not officially reported. The opinion of the Court of Appeals is reported at 227 F. 2d 470 (Appendix A of Petition).

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

The statement by petitioner of the questions presented in this proceeding is incorrect. No such questions are at hand.

1. There is involved no "collateral attack" upon a fixed rate. Rather there is an attempt upon the part of petitioner to force upon respondent a misconstruction and misapplication by the Commission of the respondent's contract with petitioner in determining one of several items making

up petitioner's rates to distributors in a proceeding in which respondent was not a party and was not heard. A separate proceeding was pending at the time to determine respondent's rate, that is, what it could charge petitioner under its contract with petitioner.

2. There was no attempt here on the part of the court below to overthrow an "effective rate" under the Commission's regulations by applying "principles of general contract law." Under its own regulations the Commission fixed as the rates of independent producers those prices of contracts in effect on a certain date. The Court merely corrected an undisputed misconstruction of the contract here involved. Respondent's rates as so fixed are subject to revision by the Commission if and when it should, after proper hearing, determine the rates to be unjust and unreasonable.

Statute Involved.

The statute involved is the Natural Gas Act (52 Stat. 821-833; Title 15 U. S. C., Secs. 717-717w). The pertinent provisions are printed in Appendix B to the petition.

STATEMENT OF THE CASE.

1. The Nature of the Proceedings in the Lower Court.

Pursuant to this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672, holding respondent to be a natural gas company within the meaning of the Natural Gas Act, the Commission undertook the regulation of respondent and all other independent producers of gas. For this purpose, the Commission on July 16, 1954, issued its Order No. 174 (19 F. R. 4534-37), subsequently superseded on August 6, 1954, by Order No. 174-A (19 F. R. 5081-83). These orders established regulations requiring that all independent producers file rate schedules applicable to their sales of gas in interstate commerce for resale. Section 154.93 of these regulations defined the term "rate schedule" as "* * * the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954." The necessary effect of these regulations, and the Commission's intention in adopting them, was that the price provided by the contracts which were in effect on June 7, 1954, would be recognized as an independent producer's just and reasonable rate until further action was taken by the Commission in accordance with the provisions of the Natural Gas Act.

By orders issued October 1, 1954, and December 8, 1954, the Commission attempted to suspend part of the rate which respondent was collecting on June 7, 1954, on the ground that such part constituted a change in rate and was therefore subject to suspension under the provisions of Section 4(e) of the Natural Gas Act (R. 83-86). As permitted by Section 19(b) of the Natural Gas Act, respondent filed a petition for review of these orders with the United States

Court of Appeals for the Tenth Circuit. Upon review, that court held that, under the regulations which the Commission itself had adopted, the rate which was provided by respondent's contract was its effective rate on June 7, 1954, that the rate which the Commission had attempted to establish by its orders was not in accord with the provisions of the contract which established respondent's rate, and that accordingly the attempted suspension must be set aside.

There were no hearings held before the Commission. The proceedings in the lower court were concerned only with the proper interpretation of respondent's contract as related to the general rules and regulations established by the Commission, and there was no review and no occasion for review of a rate fixed by the Commission after hearing and findings. The Court of Appeals specifically held that the Commission had instituted an investigation of respondent's rates and that their level in the future is a matter for the Commission, the only limitation being that any inquiry by the Commission must start with the effective contract rate on June 7, 1954.

The Commission has not applied for a writ. On the contrary, by order adopted February 8, 1956, and issued February 9, 1956, the Commission has accepted the lower court's decision and spread it upon its own records (the full text of the order is printed in Appendix A hereto).

2. Petitioner's Intervention in the Court Below.

Since the proceedings in the court below involved only the proper determination of respondent's rates under regulations of general applicability, and of which petitioner does not complain, it would not have been expected that petitioner would find occasion to intervene in the lower court. How-

ever, petitioner intervened for the purpose of contending that action taken by the Commission in a different proceeding, to which respondent was not a party, was controlling upon the issues between respondent and the Commission.

One of respondent's contracts affected by the Commission's regulations was respondent's contract with petitioner dated December 11, 1945, as amended. Briefly stated, this contract provided for a minimum price of 7.5930c per Mcf, with the further provision that under certain inflationary conditions respondent's rate would be increased by the application of specified factors in the event petitioner's resale rate exceeded 25c per Mcf. As a result of these provisions, on June 7, 1954, respondent was actually collecting a rate higher than the contract minimum. Petitioner on two occasions, in October of 1951 and December of 1952, placed in effect resale rates higher than 25c per Mcf, which, under the provisions of Section 4(e) of the Natural Gas Act, were suspended by the Commission and were made subject to refund in the event the Commission determined such increased rates to be unreasonable. To effectuate the provisions of the contract, respondent and petitioner entered into letter agreements, dated October 30, 1951, and January 15, 1953, providing that petitioner would pay respondent currently a price related to the resale rates then being collected by petitioner, subject to refund of any excess over the amount which would have been provided by the contract as applied to the resale rate ultimately allowed petitioner by the Commission (R. 63, 64).[1]

The ultimate resale rates of petitioner had not yet been determined by the Commission on June 7, 1954, although the

1. The provisions of the contract and the letter agreements are stated in more detail at pages 3-6 of the petition.

record in those proceedings had been closed and the matter submitted to the Commission almost a year prior thereto. As required by the regulations of the Commission, respondent filed copies of its contract and amendments thereto, including the two letter agreements, and a copy of the actual invoices to petitioner for a recent month. The invoices which were filed showed that respondent in accordance with the contract and the letter agreements, was actually collecting on June 7, 1954, a price higher than the minimum price specified in the contract (R. 69-73).

On July 30, 1954, the Commission handed down its Opinion No. 275 establishing the resale rates of petitioner (Appendix C to Petition, p. 16a). That opinion allowed certain increases in petitioner's resale rates since 1951 which, although not as great as were requested by petitioner, were sufficient to result in respondent's retaining, under the contract and the letter agreements, a substantial part of the increased prices previously paid respondent by petitioner. In that opinion, however, the Commission made certain observations concerning the possible status of respondent's rates under its contract with petitioner. It commented that this Court's decision in the *Phillips* case had made respondent's rate also subject to regulation. It referred to the Commission's historical practice of not permitting automatic increases. It then proceeded to fix petitioner's resale rates on the basis of an allowance for the cost of gas purchased (only one of many cost items affecting petitioner's total resale rate) which included only that amount which petitioner would have paid to respondent had there been no increase in the contract price. Petitioner then filed a petition for rehearing objecting to this disallowance of purchased gas cost.

On October 1, 1954, the Commission issued the first of the two orders reviewed by the court below (R. 83-86). In that order the Commission attempted to consider the increased amounts which respondent was collecting on June 7, 1954, as "rate increases" and ordered their suspension. Respondent filed a petition for rehearing from this order, but before any action was taken on that petition, the Commission issued its Opinion No. 275-A, in petitioner's rate proceeding, which modified the previous Opinion No. 275 and further increased petitioner's resale rates since 1951 (Appendix D to Petition, p. 23a). In doing so, the Commission stated that its prior disallowance as a cost to petitioner of the amounts paid to respondent under the contract was incorrect, because:

> "When we issued Order No. 174-A on August 6, 1954, it was based primarily upon our conclusion that from and after the decision of the Supreme Court in the *Phillips* case, it was necessary and proper in the reasonable administration of the Natural Gas Act to establish some cut-off date and recognize as of that date the established firm price being paid under gas purcase contracts. Accordingly, we provided for the filing of rates in effect on June 7, 1954, the date of the *Phillips* decision. The establishment of rates in effect on June 7, 1954, necessarily involved the recognition in many cases of past increases resulting from escalator provisions, favored-nation clauses or contract renegotiations, as provided for in the gas purchase contracts then in effect. We feel that failure to recognize some increase in the price of gas to Phillips would carve out an unwarranted exception to the policy established by our Order No. 174-A and be somewhat unfair to Phillips when compared with the treatment which we accorded other independent producers which are also natural-gas companies." (Opinion No. 275-A, pp. 27a and 28a, Appendix D to the Petition.)

Even so, however, the Commission did not allow petitioner all of the amounts paid pursuant to the contract, but instead merely increased the allowance for gas purchased in an amount which was intended to and did cover only a portion of the amounts previously paid by petitioner. The amount allowed petitioner as a cost for gas purchased prior to December 12, 1952, was 7.593c, whereas the contract properly applied provided and petitioner had paid respondent 8.374c per Mcf. The amount allowed on and after June 7, 1954, was 8.374c, whereas the contract properly applied provided and petitioner had paid respondent 8.4684c per Mcf.[2] Nevertheless, petitioner elected to accept the resale rate fixed for it by the Commission on the basis of these cost allowances and did not appeal.

In its Opinion No. 275-A, the Commission stated that "some modification" would be required in the order directed against respondent and that such action would "be entered in the appropriate docket (No. G-3176)."[3] (Opinion No. 275-A, Appendix D to the Petition, p. 28a.) This action was taken in the order of the Commission issued December 8, 1954, which was the second of the two orders reviewed below (R. 106-110). In that order the Commission in substance repeated what it had said in its Opinion No. 275-A and "granted permission" to respondent to file rates in the same amount as those allowed petitioner as its cost in petitioner's rate proceeding (R. 111). Because the amount permitted was less than provided by the contract and less than respondent was actually collecting, and because the

2. Petitioner had actually paid respondent a price higher than 8.374 cents and 8.4684 cents during these respective periods, but under the provisions of the two letter agreements (R. 63, 64) respondent was required to and did refund any excess over these prices.

3. This docket was styled "In the Matter of Phillips Petroleum Company."

Commission rejected a conditional rate filing tendered by respondent asking the Commission to clarify its orders, petitioner filed its petition for review in the court below.

Petitioner has never challenged respondent's interpretation of the contract and does not contend here that the lower court misconstrued the contract. Rather, petitioner belatedly intervened in the court below to contend that, instead of attempting to determine respondent's rate in those proceedings directed against respondent, the Commission had fixed respondent's rates in the proceeding involving petitioner's rates (to which respondent was not a party) at the same level as that allowed petitioner as a cost.[4]

3. The Decision of the Court of Appeals.

The decision of the Court of Appeals upheld respondent's contention that, under the regulations established by the Commission, respondent's effective rate on June 7, 1954, was the rate provided by the contract (8.4684c) as related to the resale rate established for petitioner by the Commission in its Opinion No. 275-A and not the lesser amount which the Commission had attempted to provide. The court further held that since this rate had become effective before the Commission's regulations became applicable, the Commission had no power to order its suspension.

With respect to the contentions made by petitioner, and the rate which petitioner was seeking to uphold, the Court of Appeals stated:

> "On the basis of Michigan's adjudicated resale rate of 31.25c per Mcf from September 1951 to Decem-

4. Petitioner's intervention appeared to be an afterthought. Although it had had knowledge of the review proceedings for several months, it did not apply for leave to intervene until after respondent's brief was filed and only about two weeks before the case was argued.

ber 1952, the Commission allowed Phillips a rate, effective June 7, 1954, of 8.374c, and using that wholesale rate as a cost basis, the Commission allowed Michigan a resale rate of 31.60c from and after December 12, 1952. The rate thus allowed Phillips bore no relationship to the contracts in force on June 7, 1954, but was concededly an equitable gratuity, justified only as an authorized administrative adjustment. Phillips was not a party to the proceedings which purported to fix its rate, and we can find no warrant in the Natural Gas Act for the determination of its rates and charges in a proceedings to which it was not a party. Moreover, since we hold that Phillips' applicable and effective rate on June 7, 1954, was 8.4684c, it follows that any other rate was unauthorized and cannot be sustained." (Appendix A to the Petition, pp. 11a-12a.)

ARGUMENT.

Petitioner strains to create the illusion of important questions of administrative law lurking within this case which should attract the attention of this Court. But delicate phrasing cannot supplant a record deficiency of facts essential to present such questions. The contentions which petitioner makes were not made in the court below by the Commission. At no time has the Commission attempted to support the validity of its orders on any such grounds—nor does it do so here, for the Commission is not seeking a writ and is not even named as a party to this proceeding. It would not appear presumptuous to assume that, if the decision of the Court of Appeals were to have the far-reaching effect upon administrative functions which petitioner predicts, the Commission would be here urging review with every means at its disposal. The fact that the Commission is not here, and that it has accepted the lower court's decision by specific and affirmative order, makes manifest that the Commission has accepted the decision for what it is—a decision upon a question so narrow in its scope and so closely tied to a peculiar factual situation that its future even as precedent is limited and certainly its effect upon administrative proceedings in general remote.

The principal device which petitioner adopts to justify a review by this Court is the suggestion that the lower court's decision may indirectly sustain a collateral attack. Not only this Court but courts in general have consistently resisted the interminable prolonging of litigation by means of collateral attack, and consequently the mere inference that one is involved can on occasion be calculated to invite close scrutiny. To bolster that hope there is in this instance

the added inference that the court below ignored an administrative determination of a rate and undertook to usurp the administrative function by itself fixing a rate solely on the basis of private contract. Again it should be noted that it is only petitioner which is concerned with these asserted encroachments upon administrative powers, not the administrative agency which is said to be affected.

1. Petitioner Is Merely Attempting to Shift the Burden of the Commission's Error to Respondent.

Petitioner does not contend that the amount allowed by the Commission in petitioner's rate proceeding as the cost for gas purchased from respondent correctly reflected the amount which respondent was entitled to receive under its contract. Petitioner and respondent were at all times in agreement as to the proper construction of the contract and petitioner knew that respondent did not recognize the Commission's action in petitioner's rate proceeding as being determinative of respondent's effective rate (Petition, p. 8). Yet petitioner was satisfied with the total rate fixed for it by the Commission; at least it chose to accept it without asking for a review by the courts. The matter of the cost of gas purchased was only one of many cost items affecting petitioner's total rate and petitioner apparently did not desire to jeopardize the end result by holding its case open on appeal.

Now, however, petitioner seeks to retain not only the end result which it deliberately accepted but also the benefit of lower costs—all at the expense of respondent. Petitioner does not suggest why it is that respondent should bear this burden. The inference which arises from petitioner's argument is that because respondent has oil and manufacturing operations which provide other sources of income, respond-

ent is better able than petitioner to absorb the Commission's error. Petitioner has allowed its own rate proceeding to become final so that it cannot now obtain a correction of the cost allowance. Instead, it requests this Court to place upon respondent the consequences of petitioner's failure to appeal.

What petitioner really seeks is not a review of questions of administrative law, but instead a simple determination that respondent, not petitioner, shall suffer for an incorrect determination in the petitioner's proceeding which the petitioner chose to accept. Stated otherwise, the question involved is whether the petitioner's stockholders or the respondent's stockholders should pay for the error in the petitioner's proceeding which the petitioner knowingly failed to take available steps to remedy.

2. The Questions of Administrative Law Sought to Be Raised by Petitioner Do Not Exist.

Petitioner seeks to raise what appear to be questions of administrative law by asserting that the decision of the lower court (*1*) "sanctions collateral attacks upon administrative orders by persons who, knowing that their rights are involved in administrative proceedings, nevertheless elect to remain aloof until the rights of others have been irrevocably fixed in such proceedings" and (*2*) "assumes authority to set aside an administrative order determining the rates of a regulated company under valid agency regulations by applying principles of general contract law." (Petition, p. 12.) We will show that these questions do not exist.

(a) ***There Is No Collateral Attack:***

The asserted sanction of collateral attack is based upon the assumption that the Commission attempted to fix re-

spondent's rates in petitioner's rate proceedings in the absence of respondent as a party. The authority for this unusual action is said to lie in the fact that, because one of the important elements in petitioner's cost of service is the cost of gas purchased, the Commission *must* fix petitioner's supplier's rates before fixing petitioner's. We agree that it may be orderly procedure for the Commission to do so. But we know of no provision in the Natural Gas Act which requires the Commission to consider its business in any particular sequence. Moreover, even if such a requirement existed, petitioner is hardly in a position to complain, for it raised no objection to the Commission's procedure of *assuming* a cost for gas purchased and made no attempt to hold its own proceeding open until that question had been decided in orderly fashion.

In any event petitioner's assumption is erroneous in fact because there is no indication that the Commission was attempting to fix respondent's rates in petitioner's rate proceeding. In its Opinion No. 275 the Commission said, not that it was fixing respondent's rate, but that it was determining whether a particular item claimed as a cost of operation by petitioner should be allowed or disallowed. The Commission there said:

> "We find and determine that the increased cost of gas purchased as claimed by Michigan-Wisconsin in these dockets to the extent that they are based upon the operation of the escalator clauses, should be disallowed." (Opinion No. 275, Appendix C to Petition, p. 21a.)

That the disallowance may have been erroneous merely made it a matter to be considered upon review timely filed. It certainly did not mean that the Commission, without evidence and without findings, thereby fixed respondent's rates

at that same level. The amount allowed as an operating expense is not necessarily the same, nor is it required to be the same, as the price collected or to be collected by the seller. *Acker* v. *United States*, 298 U. S. 426, 430, 431 (1936); *Western Distributing Co.* v. *Public Service Commission of the State of Kansas, et al.*, 285 U. S. 119, 124, 125 (1932); *Humble Oil & Refining Co.* v. *Railroad Commission of Texas*, 128 S. W. 2d 9, 15 (1939). Even the Commission recognized that matters directly affecting respondent's rates were to be dealt with in proceedings wherein respondent was the named party.

But assuming for the sake of argument that the Commission did undertake to fix respondent's rates in a proceeding to which it was not a party, there still is no collateral attack. By its own argument petitioner admits that before any collateral attack could exist respondent must have been bound by the Commission's Opinion No. 275-A. The law does not thrust any such binding effect upon absent parties in cases of this kind.

A proceeding specifically involving respondent's rates and naming respondent as a party had been initiated by the Commission. Respondent was not required to try out the question of its rates in a different proceeding involving different issues while at the same time a proceeding concerning those rates was pending. Respondent may have had the right to intervene in petitioner's rate proceedings. But the question is whether it was required to do so. That question has been answered in the negative. In *Zenith Radio Corp.* v. *Federal Communications Commission*, 211 F. 2d 629, 634, (Ct. of App. D. C., 1954) it was held that failure to intervene in another proceeding does not amount to a waiver and cannot destroy a statutory right to a hearing involving the particular person. The court said:

"Zenith probably had a right to intervene as a party in the rule-making proceedings and also in the renewal and transfer proceedings. But we are not concerned with its right to intervene; our question is whether it was required to intervene in them. For reasons which appealed to it, and with which we have no concern, Zenith chose to stand upon its statutory right to a hearing. No good reason why it should not do so appears, and we think a waiver of that right would have to be clear and intentional."

As the only support for its position, petitioner cites several cases under the Communications Act holding that a radio broadcasting licensee who may be adversely affected by the grant of a license to another applicant must intervene or waive his right to complain. All that these cases hold is that where the grant of a new license or modification of an existing license will have an economic effect upon or will interfere with the signals broadcast by another station, the Communications Commission need not consider such effects unless the affected station intervenes. They do not hold, as they must to support petitioner, that in such proceedings the Communications Commission could proceed not only to grant the new license without regard to the effect upon the existing station but could also cancel or otherwise directly limit the license of the existing station, in the absence of such station as a party.

To accept the contentions of petitioner would extend the powers of the Commission far beyond the limits contemplated by the Natural Gas Act. Sections 4 and 5 of the Natural Gas Act authorize the Commission to determine reasonable rates for natural gas companies, but only after hearings and specific findings as to the reasonableness or unreasonableness of the existing rates. *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U. S. 626, 634 (1945).

The Act was certainly not intended to permit the Commission to fix respondent's rates in a proceeding to which respondent was not a party, in which no evidence whatever was introduced in regard to the "reasonableness" of respondent's rates, and in which none of the findings required by the Act were made.[5]

(b) *The Commission, Not the Court Below, Established the Contract as the Measure of Respondent's Rate:*

Petitioner's sole complaint under its second point is that the court below did not uphold the Commission in a *misconstruction* of respondent's contract. Petitioner does not deny that the court's construction of the contract is the proper one. Instead, petitioner asserts that the Commission "did not intend to give effect to all of the provisions of the contract" (Petition, p. 18) and that the court below in effect usurped administrative function when it found that the Commission's regulations did require application of all of the provisions of the contract.

The decision of the court below does not prevent the Commission from taking any further action which the Commission desires with respect to respondent's contract. On the contrary, it specifically recognizes that the Commission has established an investigation of respondent's rates and that the contract rates may be changed if found to be unreasonable. All that the court below did was to find that

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5. Petitioner attempts to escape these specific requirements by the pointless assertion that the question involved was not a change in rate governed by Sections 4(d) and 4(e) but rather respondent's initial rate under Section 4(c) (Petition, pp. 16-17). Petitioner does not, as it could not, point out wherein this difference, if it is fact, frees the Commission of the requirement of hearings and findings. Moreover, this position is squarely in conflict with that of the Commission, which defended its orders in the court below on the ground that all that was involved was a suspension of a rate increase under Section 4(e).

the Commission had misconstrued and misapplied its own regulations. Order No. 174-A clearly and unambiguously provided that the contract together with all the amendments and supplements thereto would establish the effective rate on June 7, 1954. That standard was fixed by the Commission, not by the court. The court did no more than to require the Commission to follow the direction of the regulations which the Commission had itself established.

Petitioner's assertion that the court below has assumed the power to set aside a decision of the Commission on principles of general contract law does not conform with the facts. Here again, the failure of the Commission to complain of the court's action is conclusive that the asserted assumption of power does not in fact exist.

3. The Decision of the Court Is Correct.

The decision of the court below as to the proper level of respondent's rate is unquestionably correct. The Commission's regulations indisputably established the contract as the measure of respondent's rates. There is no question but that on June 7, 1954, respondent was actually collecting the rate found by the court below to be its effective rate. Petitioner does not and could not dispute that fact. The rate being effective, there was nothing for the Commission to suspend. In so holding, the decision of the court below is in every respect consistent with the clear wording of the Natural Gas Act and the decisions of the courts which have construed it.

Reduced to its substance, this case involves nothing more than the proper construction of a particular contract with peculiar terms which, if they do not result in reason-

able rates, the Commission has full power to set aside. This Court has many times made clear that issues so confined in their scope and so devoid of general impact will not warrant the exercise of the discretionary power of certiorari.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION.

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck and William R. Connole.

In the Matter of Phillips Petroleum Company
Docket No. G-3176

ORDER VACATING SUSPENSION PROCEEDINGS AND ESTABLISHING EFFECTIVE RATE

Adopted: February 8, 1956 Issued: February 9, 1956

Phillips Petroleum Company (Phillips) on August 31, 1954, submitted for filing a basic contract dated December 11, 1945, and certain amendatory and supplementary agreements thereto, relating to the sale of natural gas to Michigan Wisconsin Pipeline Company (Michigan-Wisconsin). The basic contract was designated as Phillips Petroleum Company FPC Gas Rate Schedule No. 4. The basic contract as amended on December 1, 1949, contains a provision that Phillips' base price upon the happening of certain contingencies would be escalated in the same ratio as Michigan-Wisconsin's effective rates to its customers exceeded 25 cents per Mcf. Pursuant to rate increase filings in two separate dockets and upon expiration of suspension periods therein, Michigan-Wisconsin on October 1, 1951, began charging 31.5 cents per Mcf, (Docket No. G-1678) and on December 12, 1952, 35 cents per Mcf (Docket No. G-1996) for its wholesale sales of natural gas, subject to refund of all amounts found by the Commission, after hearing, to be not justified.

By letter agreements dated October 30, 1951, with respect to the October 1, 1951 increase and January 15, 1953 with respect to the December 12, 1952 increase, Michigan-Wisconsin and Phillips agreed that Michigan-Wisconsin

would pay Phillips the escalated price based upon the increased rates, subject, however, to refund of any amount paid in excess of that required by the contract formula based on the Michigan-Wisconsin's wholesale rate ultimately approved by this Commission. The letter agreements of October 30, 1951, and January 15, 1953, were included by Phillips in its filing of August 31, 1954, and were designated as Supplements 8 and 11, respectively, to Phillips FPC Gas Rate Schedule No. 4.

By order issued October 1, 1954, in this docket, Supplements Nos. 8 and 11 to Phillips FPC Gas Rate Schedule No. 4 were suspended and their use deferred until February 1, 1955. By order issued in this docket on December 8, 1954, the Commission modified the suspension order issued October 1, 1954, to permit Phillips to file a new supplement to its FPC Gas Rate Schedule No. 4 to make effective as of June 7, 1954, a base rate of 8.374 cents per Mcf at 14.65 psia,[1] plus certain adjustments.[2]

On February 7, 1955, Phillips filed in the United States Court of Appeals for the Tenth Circuit its Petition to Review and Set Aside the foregoing orders of October 1, 1954, and December 8, 1954. The Court by its opinion in Case No. 5096, *Phillips Petroleum Company, Petitioner,* v. *Federal Power Commission, Respondent,* decided November 16, 1955, held that the effective base rate on June 7, 1954, for Phillips' sales to Michigan-Wisconsin was 8.4684 cents per

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1. The Commission had fixed Michigan-Wisconsin's rate at 31.25 cents per Mcf in Docket No. G-1678, and giving effect to the escalation clause, on the basis of such rate, Phillips' base rate would have been 8.374 cents per Mcf. However, Phillips did not make a satisfactory filing of the 8.374 cent rate to meet the conditions of the order.

2. The adjustments on the "Dedicated Acreage" price are for Texas and Oklahoma taxes and for Oklahoma minimum price order. These adjustments are not at issue in this proceeding. The same adjustments apply to the 8.4684 cents per Mcf rate.

Mcf[3] and that such rate was not subject to suspension under Section 4 (e) of the Natural Gas Act.

Accordingly, pursuant to the opinion and mandate of the United States Court of Appeals for the Tenth Circuit, the suspension proceedings with respect to Supplements 8 and 11 to Phillips FPC Gas Rate Schedule No. 4 must be vacated and the rate of 8.4684 cents per Mcf established as the effective base rate for the sale of "Dedicated Acreage" gas by Phillips to Michigan-Wisconsin.

The Commission *orders*:

(A) The suspension proceedings in this docket with respect to Supplements 8 and 11 to Phillips FPC Gas Rate Schedule No. 4 be and they are vacated and the rate of 8.4684 cents per Mcf established as the effective base rate for the sale of natural gas by Phillips to Michigan-Wisconsin from the so-called "Dedicated acreage" on June 7, 1954.

By the Commission.

/s/ Leon M. Fuquay,
Leon M. Fuquay, Secretary.

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3. The court held that the rate of 31.60 cents per Mcf fixed by the Commission on August 17, 1954, in Docket No. G-1996 for Michigan-Wisconsin effective from December, 1952, was determinative of Phillips' rate on June 7, 1954, and thereby fixed such base rate under the escalation clause at 8.4684 cents per Mcf. To this must be added the adjustments noted in 2 above. Similarly applying the court's reasoning to the rate for gas from Stratford acreage the rate for that gas on June 7, 1954, was 8.993 cents per Mcf plus adjustment for Texas taxes.

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FILED
MAR 17 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 684

MICHIGAN WISCONSIN PIPE LINE COMPANY,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

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THE BYNTHROP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 684.

MICHIGAN WISCONSIN PIPE LINE COMPANY,
Petitioner,

vs.

PHILLIPS PETROLEUM COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

In accordance with Rule 24(4) of the Rules of this Court, petitioner submits the following in reply to respondent's brief in opposition to the granting of the writ.

A. PETITIONER COULD NOT PROTECT ITSELF FROM ERROR IN THE COMMISSION'S DETERMINATION OF RESPONDENT'S INITIAL RATE.

Phillips first argues (Brief, 12-13) that petitioner is attempting to "shift the burden of the Commission's error to respondent," and that *petitioner* could have protected itself by appealing from the Commission's determination of Phillips' rates in the Michigan Wisconsin rate case. The fallacy in this contention demonstrates precisely why this is an important matter for this Court's consideration.

In Opinion No. 275-A, the Michigan Wisconsin rate case decision, the Commission finally determined that Phillips'

lawful rate to petitioner effective June 7, 1954 was 8.423¢ per Mcf and fixed petitioner's cost of gas on that basis. Since petitioner was allowed as its cost the full price that Phillips might lawfully charge under the Commission's decision, petitioner had no reason—and indeed lacked requisite interest—to appeal the Commission's decision as to Phillips' proper charge.

In order to appeal under Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b), one must be "aggrieved" by the order sought to be reviewed. Petitioner was allowed as its cost of gas the full price the Commission determined that Phillips might charge and thus was not "aggrieved" by the order. Yet Phillips is now suggesting that petitioner had a duty to appeal the order in an attempt to set aside the Commission's determination of Phillips' charges to petitioner on the ground that they were too low!

This *non-sequitur* serves to emphasize why Phillips had a right and a duty to participate in the Michigan Wisconsin proceedings. Phillips, not petitioner, was the proper party to challenge the Commission's decision in Opinion No. 275-A fixing Phillips' rates. Of the two parties before the Court, Phillips alone had power to protect *both* parties from the consequences of error in the Commission's determination. But Phillips elected to remain aloof from the proceeding in which that determination was made, as a result of which one of the parties must suffer a large loss. It is consonant neither with principles of justice nor with sound administrative practice to shift the loss to petitioner, who was powerless to avoid it.

B. PHILLIPS' PETITION FOR REVIEW WAS A COLLATERAL ATTACK UPON OPINION NO. 275-A.

Phillips next argues (Brief, 13-17) that the Commission did not in fact determine its rates in the Michigan Wisconsin proceeding, and that in any event it is not bound by that determination.

With respect to the question whether the Commission actually determined Phillips' rates in the Michigan Wisconsin proceeding, the record permits only one answer. In its order issued October 1, 1954 in response to Phillips' rate filing, the first order under review in this case, the Commission, after referring to the fact that the question of Phillips' lawful charges was already in issue in the Michigan Wisconsin proceeding, stated:

> "On September 27, 1954, upon consideration of the application of Michigan Wisconsin Pipe Line Company for modification of Opinion No. 275 and accompanying order, the Commission granted such application to the extent only that it requested a reconsideration of that opinion and order upon the present record. In the determination of the issues thus raised, *consideration must be given to the proper rates for gas purchased by Michigan Wisconsin from Phillips,* and it is proper and in the public interest that *pending such reconsideration* the rate increases filed by Phillips applicable to gas purchased by Michigan Wisconsin be suspended" (R. 85).[1]

Again in Opinion No. 275-A, the Commission made clear that it was first determining Phillips' rates and then applying that rate to fix petitioner's cost of gas purchased. The Commission said:

> "We find that on the basis of equal treatment with other producers which have been accorded their effective June 7, 1954, rates, *Phillips is in equity entitled to a rate which will give effect to Michigan-Wiscon-*

[1] Emphasis is supplied throughout.

> *sin's resale rate of 31.25¢ per Mcf* which we have found to be proper in Docket No. G-1678. The resultant rate is 8.423¢ per Mcf at 14.735 psia for gas from the Dedicated Acreage. Using that rate to figure the cost of gas in determining Michigan-Wisconsin's cost of service in Docket No. G-1996, we find that a fair and reasonable rate, applicable to sales for resale by Michigan-Wisconsin from and after December 12, 1952, is 31.60¢ per Mcf."

The Commission then continued:

> "This will require some modification of the Commission's order issued October 1, 1954, suspending certain of Phillips' rates. Such action will be entered in the appropriate docket (No. G-3176)."[2]

Finally, in its order issued December 8, 1954, the second order here under review, the Commission simply quoted from Opinion No. 275-A and applied the conclusions it had reached in that decision with respect to Phillips' proper charges (R. 106-10).

In the light of a record so clear and explicit, respondent's statement (Brief, 14) that "there is no indication that the Commission was attempting to fix respondent's rates in petitioner's rate proceeding" is difficult to understand. The Commission said as clearly as the English language permits that it intended to give consideration "to the proper rates for gas purchased by Michigan Wisconsin from Phillips" upon reconsideration of its original decision in the Michigan Wisconsin rate case (R. 85). Nor was Phillips ever in doubt that the question of its rates was in issue—indeed, was the *sole* issue—upon consideration of Opinion No. 275.

Phillips next argues (Brief, 15-17) that, even though the Commission did decide the question of its lawful charges to petitioner in the latter's rate case, Phillips is

[2] See Appendix D to petition for certiorari, p. 28a.

not bound by that determination; that, while it may have had a right to intervene, it had no duty to do so. The heart of this argument is that Phillips' rates could not be fixed in a proceeding to which it was not a party and in which no evidence or findings were made with respect to reasonableness.

The difficulty here, which Phillips attempts to minimize by footnote treatment (Brief, 17, note 5) is that the question involved was not a *change* in Phillips' rate but rather a determination under Section 4(c) of the Act as to Phillips' initial rate as of June 7, 1954.[3] That determination was, of course, bi-lateral in its effect, just as the contract upon which it was based was bi-lateral. That is, the Commission's determination of Phillips' lawful rate fixed petitioner's obligation to pay just as it fixed Phillips' right to collect and retain. There was therefore no more reason why that determination should have been made in the docket relating to Phillips' rate filing than in petitioner's rate case, where the issue had already become material. And when the Commission unequivocally notified Phillips that the determination would be made in petitioner's rate case, Phillips was under an obligation, if it desired to protect its rights, to participate in that proceeding.

In this connection, it should be pointed out that, under the decision of the court below, Phillips' charges to petitioner were fixed in a proceeding to which *petitioner* was not a party, in which no hearings were ever held and no findings of reasonableness made. In other words, Phillips' basic contention, that its rights could not be determined in a proceeding to which it was not a party, is one that

[3] This is not in conflict with the Commission's position below. Having determined Phillips' initial rate to be lower than that claimed by Phillips, the Commission treated the excess as a rate increase proposal and set that question for hearing in accordance with Section 4(e) (R. 85-86).

petitioner might make with equal force, since petitioner was not made a party to the Commission proceedings reviewed by the court below. The one difference is that Phillips was on notice that its rates would be determined in petitioner's rate case, as in fact occurred, whereas no proceedings were ever held in the docket relating to Phillips' rate filing, and petitioner thus had no purpose or opportunity to intervene in that docket.

The lack of basis for Phillips' position is emphasized by its attempted reliance upon *Zenith Radio Corp.* v. *Federal Communications Commission*, 211 F. 2d 629 (C. A. D. C.). There, it was held that one who had made an application for a license to operate a television station on a particular channel had not waived its statutory right to a hearing on that application because it failed to intervene in *rule-making* proceedings involving the allocation of television channels in a number of cities. The court said (p. 634):

> "Such an established statutory right requires adjudicatory disposition, and the procedure which is sufficient for rule-making is not sufficient for that purpose."

Moreover, the petitioner in that case was able to show that the rule-making proceedings did not purport to decide the question as to which company should operate a particular channel but was concerned with what channels should be assigned to various cities.

Here, on the other hand, Phillips does not question the fact that it received explicit notice that the question of its proper initial charge to petitioner would be decided in petitioner's rate case (R. 85) nor deny that such a determination would have been entirely appropriate if it had seen fit to intervene. Phillips' position is and must be that

the Commission's determination in Opinion No. 275-A of Phillips' lawful charges to petitioner is not binding on Phillips solely because it saw fit not to participate in that proceeding. That, certainly, was the sole basis of the decision of the court below on this question. (Pet. App. 12a.) But as was pointed out in the petition for certiorari, decisions such as *Red River Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 282 (C. A. D. C.) are to the contrary. Having failed to participate in the proceeding or to appeal the decision passing directly on the question of its proper initial charge to petitioner, Phillips cannot now use a purely collateral order of the Commission as a vehicle for an attack on the substantive determination.

C. THE COURT BELOW DETERMINED PHILLIPS' RATE TO BE HIGHER THAN THAT ALLOWED BY THE COMMISSION.

Phillips' position with respect to the question whether the court below properly determined its lawful rate as of June 7, 1954, is that Order No. 174-A of the Commission "clearly and unambiguously provided that the contract together with all amendments and supplements thereto would establish the effective rate on June 7, 1954" (Brief, p. 18). Thus, it is argued, the question was purely one of construction of the contract—as to which the Commission was wrong and the court below right.

It should be noted that Opinion No. 275, which was issued two weeks *after* Order No. 174 was adopted, held that the automatic escalator provisions of the contract could not be regarded as effective in determining Phillips' rate as of June 7, 1954. The result is that the interpreta-

tion of Order No. 174 that seems "clear and unambiguous" to Phillips was specifically rejected by the Commission only two weeks after adoption of that Order.

Order Nos. 174 and 174-A define an independent producer's rate schedule as "the basic contract and all supplements or agreements amendatory thereof, *effective and applicable* on and after June 7, 1954." Phillips and the court below took the position that this presented purely a question of contract law, namely, a determination of the price effective and applicable on June 7, 1954, under the contract. But the Commission, only two weeks after issuing the order, pointed out that all provisions of a contract were not "effective and applicable" on June 7, 1954, if they contravened the provisions of the Natural Gas Act. Neither Phillips nor the court below has ever been able satisfactorily to explain why the Commission's contemporaneous interpretation of its own order is erroneous or by what right the court may peremptorily set it aside.

CONCLUSION.

The brief in opposition serves merely to emphasize the importance of the questions presented by the petition for certiorari. Phillips seeks support for its position mainly from the fact that the Commission has not independently sought certiorari in this Court. Petitioner does not, of course, know what considerations were involved in that decision, but the expectation that legislation would be passed exempting independent producers from regulation by the Commission may well have been a factor. While the questions presented are in no sense limited to the factual situation here involved, the fact that such legisla-

tion failed to become law makes even more certain that those questions will arise in the future.

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